

(29,099)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 549.

PENNSYLVANIA COAL COMPANY, PLAINTIFF IN ERROR,

vs.

H. J. MAHON AND MARGARET CRAIG MAHON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
PENNSYLVANIA.

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1 In the Court of Common Pleas of Luzerne County,
October Term, 1921.

In Equity.

No. 11.

H. J. MAHON and MARGARET CRAIG MAHON

vs.

PENNSYLVANIA COAL CO.

Among the Records and Proceedings enrolled in the Court of Common Pleas in and for the County of Luzerne, in the Commonwealth of Pennsylvania, in the above entitled case, is contained the following:

Copy of Continuance Docket Entry.

11,

H. J. MAHON and MARGARET CRAIG MAHON

vs.

PENNSYLVANIA COAL COMPANY.

W. L. Pace.

H. J. Mahon.

Now, 8 Sept. 1921, Injunction Bill filed and therewith certificate that there has not been time to print.

Now, September 8", 1921, the preliminary injunction and hearing of motion on same are continued until September 30", 1921 at 2:00 P. M.

By the Court,

FULLER,
P. J.

Now, 29 Sept. 1921, Def't's answer filed.

Now, 10 Oct. 1921, by decision filed the preliminary injunction is dissolved.

By the Court,

FULLER,
P. J.

Now, 19" October, 1921, exception to the decision of the Court of 10" Oct. 1921 in dissolving preliminary injunction filed.

Now, 19" October, 1921, the exception taken by plaintiff to decision and action of the Court in refusing and dissolving the pre-

liminary injunction in said foregoing entitled case, is noted and directed to be filed and bill is sealed.

HENRY A. FULLER, [SEAL.]
P. J.

Now, 17 October, 1921, the above entitled case is directed to be placed on Equity trial list for Equity Court term commencing week of October 24", 1921.

By the Court,

FULLER,
P. J.

Now, 22 Oct., 1921, Replication filed.

Now, 26 Oct., 1921, Stenographer's Record lodged.

Now, November 7", 1921, this case came on to be heard at this term and was argued by counsel, and upon consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiff-.

By the Court.

J. D., 47.

2 Now, 16 Nov., 1921, Exceptions to Decree Nisi filed.

Now, 21 Nov., 1921, Decree Nisi returned service accepted 21 Nov., 1921 by W. L. Pace, Atty. for Plff-. and P. F. O'Neill, Atty. for Defts.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By the Court in Banc.

J. D., 47.

Now, 19 Dec., 1921, the plaintiffs respectfully excepts to the order and decree of the Court of Dec. 6", 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiff-. W. L. Pace, Atty. for Plff-.

Now, 19 Dec., 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

Now, 19 Dec., 1921, I hereby certify that the amount in controversy in the above entitled case exceeds the sum of \$1,500.00.

By the Court,

FULLER,
P. J.

Now, 28 Dec., 1921, Appeal Bond in the sum of \$200.00 with S. M. Parke and William Dury as sureties filed. Same day approved by Prothy.

Now, 28 Dec., 1921, Certiorari from Supreme Court received and filed bearing teste 21 Dec., 1921 Returnable at Phila., Pa. the second Monday of April, next (1922) and numbered in said Court No. 290 Jan'y Term, 1922 and endorsed thereon by Teese H. Harris, Henry S. Drinker, Jr., William S. Jenney and Frank W. Wheaton Attorneys for appellees, Now Dec. 28, 1921, service of within writ is hereby accepted and appellee pleads thereto "In Nullo Est erratum."

3 COMMONWEALTH OF PENNSYLVANIA,
County of Luzerne, ss:

I, Evan J. Williams, Jr., Prothonotary of the Court of Common Pleas in and for said County, do hereby certify that the foregoing is a full, true and correct copy of the whole record of the case therein stated, wherein H. J. Mahon & wife — Plaintiff- and Penna. Coal Co. — Defendant so full and entire as the same remains of record before the said Court at No. 11 of October, in Equity Term, A. D. 1921.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at Wilkes-Barre, Pa., this 20th day of February A. D. 1922.

EVAN J. WILLIAMS, JR.,
Prothonotary.

I, Henry A. Fuller, President Judge of the Eleventh Judicial District, composed of the County of Luzerne, do certify that Evan J. Williams Jr., by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Court of Common Pleas of said County, was at the time of so doing and now is Prothonotary in and for said County of Luzerne, in the Commonwealth of Pennsylvania, duly commissioned and qualified to all of whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere, and that the said record, certificate and attestation are in due form of law, and made by the proper officer.

President Judge.

I, Evan J. Williams, Jr., Prothonotary of the Court of Common Pleas in and for the said County do certify that the Honorable Henry A. Fuller by whom the foregoing attestation was made and
4 who has hereunto subscribed his name, was at the time of making thereof and still is President Judge of the Court of Common Pleas, and Court of Quarter Sessions of the Peace in and for said County, duly commissioned and qualified, to all whose acts as such full faith and credit are and ought to be given as well in courts of judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of February, A. D. 1922.

EVAN J. WILLIAMS, JR.,
Prothonotary.

Endorsement: In Equity.—No. 11 Oct. Term, 1921.—H. J. Mahon et ux. versus Penna. Coal Company.—Exemplified Record from Luzerne County.—Debt. \$—. Int. from ———, ———. Costs, —. Record entered and filed ———, ———. ———, Prothonotary.

5 In the Court of Common Pleas of Luzerne County, October Term, 1921.

No. —.

Between

H. J. MAHON and MARGARET CRAIG MAHON

vs.

PENNSYLVANIA COAL COMPANY.

Injunction Bond.

Know all men by these presents, that we H. J. Mahon and Margaret Craig Mahon, principals, and S. M. Parke and A. C. Shoemaker, sureties, of Pittston City, Luzerne County, State of Pennsylvania, are held and firmly bound unto the Pennsylvania Coal Company, in the sum of Five Hundred Dollars, lawful money of the United States, to which payment well and truly to be made we do bind ourselves and each of us, our heirs, executors and administrators, and each of them, severally and jointly, firmly by these presents. Sealed with our seals and dated this 3rd day of September, A. D. 1921.

Whereas the above bounden H. J. Mahon and Margaret Craig Mahon, have applied to the Court of Common Pleas, in Equity, of Luzerne County, for an injunction to restrain said Pennsylvania Coal Company from mining out and removing from beneath said Mahon's premises such coal as will cause the caving in of the dwelling house thereon, etc.

Now the condition of this obligation is such that if the said H. J. Mahon and Margaret Craig Mahon shall well and truly indemnify said Pennsylvania Coal Company for all the damages that may be sustained by it by reason of such injunction, then this obligation to be void, else to remain in full force and virtue.

H. J. MAHON.
MARGARET CRAIG MAHON.
S. M. PARKE.
A. C. SHOEMAKER.

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

Sealed and delivered in presence of
W. B. WALTER.

Endorsement: No. 11 October Term, 1921.—Between H. J. Mahon and Margaret Craig Mahon, vs. Pennsylvania Coal Company.—Injunction Bond.—Now 6 Sept. 1921, within bond is approved. By the Court, Fuller, P. J.—Filed 8 Sept. 1921.—W. L. Pace Attorney-at-Law, Pittston, Pa.

6 LUZERNE COUNTY, ss:

In Equity.

No. —.

MAHON

vs.

PENNA. COAL CO.

Order.

Now, September 8th, 1921, the preliminary injunction and hearing of motion on same are continued until September 30th, 1921, at 2:00 P. M.

By the Court.

FULLER,
P. J.

Endorsement: In Equity.—No. 11 Oct. T. 1921.—Mahon vs. Penna. Coal Co.—Order.—Filed 9 Sept. 1921.

7 In the Court of Common Pleas of Luzerne County, October Term, 1921, Sitting in Equity.

No. 11.

Between

H. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,
and

PENNSYLVANIA COAL COMPANY, Defendant.

In the Court of Common Pleas of Luzerne County, Sitting in Equity.

Plaintiffs' Bill.

To the Honorable the Judges of said Court:

The plaintiffs complain and say:

First. That they are citizens of the State of Pennsylvania and residents of the City of Pittston, Luzerne County, Pennsylvania, the plaintiff H. J. Mahon, being the husband of the plaintiff Margaret Craig Mahon. The City of Pittston is a city of the third class.

Second. That the defendant, the Pennsylvania Coal Company, is a corporation of the State of Pennsylvania, with its principal office situate at Dunmore, Lackawanna County, Pennsylvania, duly authorized to conduct the business of owning, leasing and operating coal lands in the State of Pennsylvania, and in mining coal therefrom and preparing and shipping the same to market, and the said defendant is now and has been for many years past engaged in the said business in the County of Luzerne and City of Pittston, aforesaid, and in other counties of said State.

Third. The plaintiffs are and have been since 1917, the owners and in possession of a certain lot or parcel of land situate in the City of Pittston aforesaid, said lot being ninety (90) feet in front on Prospect Street and approximately one hundred and eighty (180) feet in depth. The said parcel of land is more fully hereinafter described.

Fourth. The plaintiffs acquired title to the land by deed from S. M. Parke and Bertha L. Parke, his wife, by deed dated November 28, 1917, recorded on the same day in the Recorder's Office of Luzerne County, in Deed Book No. 518, at Page 344, and the said S. M. Parke, acquired title to the said parcel by deed from Margaret Craig Mahon and H. J. Mahon, her husband, plaintiffs herein, by deed dated November 27, 1917, recorded November 28, 1917, in Luzerne County in Deed Book No. 518, at Page 344, as by reference thereto will more fully and at large appear.

Fifth. The plaintiff, Margaret Craig Mahon, acquired title to the said parcel of land by devise under the last will and testament of her father, Alexander Craig, who died on the 14th day of May, 1910. The said last will and testament of the said Alexander Craig was duly probated in the Register's Office of Luzerne County, aforesaid and provided, inter alia, as follows:

"Item 5. I hereby give and bequeath to my beloved daughter, Margaret Craig Mahon, all the residue of my estate, including my home and all its contents, all my real estate, bonds, stocks, notes, etc., but it is my wish that she shall not sell any part thereof without the approval of the other executors, and that when any such sale is made, the proceeds thereto to be reinvested in as safe securities as possible to the end that she may always be provided with sufficient income."

Sixth. The said Alexander Craig, acquired title to the said piece or parcel of land from the Pennsylvania Coal Company, by deed dated February 7, 1878, recorded in Luzerne County, January 21, 1880, in Deed Book 217, Page 357. The said deed is as follows:

"This indenture, made the Seventh day of February in the year of our Lord one thousand eight hundred and seventy-eight between The Pennsylvania Coal Company, of the first part and Alexander Craig, of Pittston Borough, Luzerne County, Penna., of the second part.

Witnesseth that the said Pennsylvania Coal Company, for and in consideration of the sum of Six Hundred Dollars, lawful money of the United States of America unto them well and truly paid by the said Alexander Craig, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, enfeoffed, released, confirmed and by these presents do grant, bargain, sell, alien, enfeoff, lease and confirm unto the said Alexander Craig, his heirs and assigns, the surface or right of soil of the following described lot, piece or parcel of land situate in the Borough of Pittston, in the Township of Pittston, County of Luzerne and State of Pennsylvania, bounded and described as follows, to wit: Beginning at a corner of lands of the Butler Coal Co., on a twenty feet alley; thence Southwesterly by said alley about eighty feet to line of the north side of lot conveyed to Pittston Water Co., prolonged to said alley; thence by said line about 294 feet to a forty feet Street; thence by said street about 90 feet to land of the Butler Coal Co., and thence by said land about 295 feet to place of beginning. Containing 25,000 square feet of land or thereabout.

Excepting and reserving to the said Pennsylvania Coal Company, their successors and assigns all the coal and other minerals under, in or upon said lot of land. And also the right and privilege of mining and removing all the coal and other minerals under and upon said lot of land and of making and driving tunnels, passages and ways under the surface of said lot of land for the purpose of mining any coal owned by the said Pennsylvania Coal Company, 10 their successors and assigns on said land or any adjoining lands as fully and entirely as if the said Pennsylvania Coal Company, their successors and assigns remained the owners in fee of said surface or right of soil, the said Pennsylvania Coal Company, not to transport the coal and other minerals hereby reserved upon the surface of said lot, but in all other respects to be at liberty to mine and remove the same and to make and drive tunnels, passages and ways under said surface of said lot without objection or hindrance, and not to be liable to the said Alexander Craig, his heirs or assigns to or for any injury or damages that may occur by reason of mining and removing said coal or other minerals or by reason of making and driving said tunnels, passages or ways. And it is hereby expressly understood by the party of the second part, that the said party of the first part have before the date of this conveyance and before the date of the agreement in the presence of which this deed is made mined coal upon and under said lot and that the said party of the second part takes said lot as the same now is with all the risks attendant therefrom and waives all claim upon the party of the first part or their successors for any injury or damage that may hereafter arise from the mining out of said coal under said lot.

Together with all and singular the rights, liberties, hereditaments and appurtenances whatsoever thereunto belonging or in anywise appertaining and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of the said Pennsylvania Coal Company, in law, equity or otherwise howsoever of, in and to the afore-

said surface or right of soil of said lot and every part thereof excepting and reserving as aforesaid.

To have and to hold the said surface or right of said lot heriditaments and premises hereby granted or mentioned and intended so to be with the appurtenances. Excepting and reserving as aforesaid unto the said Alexander Craig, his heirs and assigns to and for the only proper use and behoof of the said Alexander Craig, his heirs and assigns forever.

And the said Pennsylvania Coal Company, for themselves and their successors do by these presents covenant, grant and agree to and with the said Alexander Craig, his heirs and assigns that they the said Pennsylvania Coal Company, and their successors all and singular the hereditaments and premises herein above described and granted or mentioned and intended so to be with the appurtenances unto the said Alexander Craig, his heirs and assigns against them, the said Pennsylvania Coal Company and their successors and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof, by, from, through or under them, the said Pennsylvania Coal Company, shall and will warrant and forever defend. Excepting and reserving as aforesaid.

In witness whereof the said Pennsylvania Coal Company have hereunto affixed their corporate seal Dated the day and year first above written.

[Penna. Coal Co. Seal.]

GEO. A. HOYT,
President.

Signed, Sealed and delivered in presence of:

WILLIAM H. CLARKSON.

Received the day of the date of the above written indenture of the above named Alexander Craig, the sum of Six Hundred Dollars in full of the consideration money above mentioned.

Witness present:

WILLIAM H. CLARKSON.

12 STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on the seventh day of February, A. D. one thousand eight hundred and seventy-eight before me, the subscriber a commissioner appointed by the Governor of the State of Pennsylvania to take acknowledgments and proof of Deeds and other writings under seal in the City of New York, to be used and recorded in the said State of Pennsylvania with full power and authority to administer oaths and affirmations personally appeared Geo. A. Hoyt, Esq., President of the aforesaid Pennsylvania Coal Company and being duly sworn deposeth and saith that he was personally present

at the execution of the above written indenture or deed of conveyance and saw the common seal of the said Pennsylvania Coal Company duly affixed thereto and that the seal so affixed thereto is the common and corporate seal of the said Pennsylvania Coal Company and that the above written indenture or deed of conveyance was duly sealed and delivered by and as and for the act and deed of the said Pennsylvania Coal Company for the uses and purposes therein mentioned and that the name of this deponent subscribed to the said deed as President of the said corporation in attestation of the due execution and delivery of the said deed is of this deponent's own proper and respective handwriting.

GEO. A. HOYT.

Sworn and subscribed the day and year last aforesaid before me Witness my hand and seal.

[Comm'n'r's Seal.]

CHARLES NETTLETON,

Commissioner for Pennsylvania in New York.

117 Broadway, N. Y. City.

Recorded 21st January 1880."

13 Seventh. The said parcel of land described in the foregoing deed of conveyance to the said Alexander Craig, was and still is underlaid with strata of anthracite coal, and at the time of the said conveyance the Pennsylvania Coal Company was the owner both of the surface and the said anthracite coal underlying the same.

Eighth. After the conveyance of the said premises by the Pennsylvania Coal Company to Alexander Craig as aforesaid, the said Alexander Craig erected thereon a two-story frame dwelling house and other improvements and for many years occupied the same as his dwelling house until his death in 1910, from which said date the plaintiffs have been and are at the present time occupying the said premises and the said dwelling house as a place of human habitation for themselves and the other members of their household.

Ninth. The Pennsylvania Coal Company, the defendant herein, is now and has been for several years past engaged in the mining out and removing of the anthracite coal underlying the said premises and preparing and shipping the same to market.

Tenth. On the 2nd day of September, 1921, the defendant, the Pennsylvania Coal Company, served a notice upon the plaintiffs in writing stating that it, the defendant, in the course of its mining operations underneath the said property would reach a point on the 15th day of September, 1921, where the removal of further quantities of coal would so weaken the subjacent support of the plaintiffs' premises aforesaid as to cause subsidence of and damage and injury to the surface of said land and to the improvements thereon, and that the plaintiffs should take such steps as might be necessary for the safety of themselves and the members of their household, and also for the protection of the said dwelling house from

injury by reason of said surface subsidence. A copy of the said notice is herein set forth, made part hereof, and is as follows:

"Scranton, Pa., Sept. 1, 1921.

To H. J. Mahon and Mrs. Margaret Craig Mahon,
7 Prospect Place,
Pittston, Pa.

DEAR SIR AND MADAM:

You are hereby notified that the mining operations of the Pennsylvania Coal Company, beneath your premises will by September 15th, have reached a point which will then or shortly thereafter cause subsidence and disturbance to the surface of your lot.

Although in the deed to Alexander Craig, under which you hold, we expressly reserved the right to remove the coal under your lot without liability for damages which might be caused thereby, we desire to notify you of the situation so as to enable you to take proper steps for the protection of your dwelling and for the safety of yourselves and the members of your household during the period when the disturbance will continue.

Yours very truly,

PENNSYLVANIA COAL COMPANY,
By W. A. MAY,
President.

Eleventh. Plaintiffs further aver that the removal of the said further quantities of coal by the mining operations of the defendant will result in a removal of the subjacent support of plaintiffs' premises, and thereby cause the caving in, collapse or subsidence of the surface of plaintiffs' said lot and damage and injury to the dwelling house thereon situate, and will compel the plaintiffs either to remove themselves and their family from their said dwelling house where they have a lawful right to be and remain peaceably without disturbance, or run the risk of serious personal injury to themselves and the members of their household in case they choose to remain thereon during said mining operations.

Twelfth. The plaintiffs further aver that the said proposed further mining operations of the defendant about to be undertaken pursuant to the notice above set forth for the purpose of mining out and removing defendant's coal from under plaintiff's premises are unlawful, being in violation of that certain Act of Assembly of Pennsylvania, approved the 27th day of May, 1921, entitled, "An act regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties."

Wherefore, the plaintiff, being in need of equitable relief and being without adequate remedy at law, and thereunto specially authorized to bring this bill by said Act, respectfully pray:

First. That an injunction issue, preliminary until final hearing, and perpetual thereafter, restraining and enjoining the defendant, its officers, agents and employes.

A. from mining out and removing from beneath the premises hereinbefore described any coal, the mining out and removal of which will cause the caving in, collapse or subsidence of plaintiffs' said dwelling; or

16 B. from so conducting defendant's said mining operations as to cause the caving in, collapse or subsidence of plaintiffs' said dwelling.

Second. For such other relief as may to your Honorable Court seem meet and proper upon final hearing.

And they will ever pray, etc.

H. J. MAHON AND
MARGARET CRAIG MAHON,
By W. L. PACE,
H. J. MAHON,
Their Solicitors.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

H. J. Mahon and Margaret Craig Mahon, the above named plaintiffs, being duly sworn, depose and say that the facts set forth in the foregoing bill of complaint are true and correct as they are informed and verily believe.

H. J. MAHON.
MARGARET CRAIG MAHON.

Sworn and subscribed to before me this 6th day of September, 1921.

[Seal of N. P.]

R. E. BOWKLEY,
Notary Public.

My comm. ex. May 24, 1923.

17 Endorsement: In Equity.—No. 11. October Term 1921.
In the Court of Common Pleas of Luzerne County.—Between
H. J. Mahon and Margaret Craig Mahon, Plaintiffs and Pennsylvania Coal Company, Defendant.—Plaintiffs' Bill of Complaint.

Notice.

To the Pennsylvania Coal Company, Defendant:

You are hereby notified and required within fifteen days after service hereof on you to cause an appearance to be entered for you in the Court of Common Pleas of Luzerne County, sitting in Equity, and to file your answer within thirty days after service hereof on you to the within bill of complaint of the within named H. J. Mahon and Margaret Craig Mahon, and to observe what the Court shall

direct. You are also notified that if you fail to comply with the above directions by not entering an appearance in the Prothonotary's Office within fifteen days, you will be liable to have the bill taken pro confesso, and a decree made against you in your absence. And you are also further notified that if you fail to comply with the above directions by not filing an answer in the Prothonotary's Office within thirty days, you will be liable to have the bill taken pro confesso, and a decree made against you in your absence.

Witness our hands at Pittston this 6th day of September, 1921.

W. L. PACE,
H. J. MAHON,
Solicitors for Plaintiffs.

30935.

18 In the Court of Common Pleas of Luzerne County, October Term, 1921, Sitting in Equity.

No. 11.

Between

H. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,
and

PENNSYLVANIA COAL Co., Defendant.

Defendant's Answer.

To the Honorable the Judges of said Court:

The Pennsylvania Coal Company, the above named defendant, saving and reserving to itself all and all manner of exceptions to the manifold errors in said bill contained, for answer thereto or to such parts thereof as it is advised it is material and necessary for it to answer, says:

First. The averments of the first paragraph of the plaintiff's bill are admitted.

19 Second. The averments of the second paragraph of the plaintiffs' bill are admitted.

Third. The averments of the third paragraph of the plaintiffs' bill are admitted.

Fourth. The averments of the fourth paragraph of the plaintiffs' bill are admitted.

Fifth. The averments of the fifth paragraph of the plaintiffs' bill are admitted.

Sixth. The averments of the sixth paragraph of the plaintiffs' bill are admitted.

Seventh. The averments of the seventh paragraph of the plaintiffs' bill are admitted.

Eighth. The averments of the eighth paragraph of the plaintiffs' bill are admitted.

Ninth. The averments of the ninth paragraph of the plaintiffs' bill are admitted.

Tenth. The averments of the tenth paragraph of the plaintiffs' bill are admitted.

Eleventh. The averments of the eleventh paragraph of the plaintiffs' bill are admitted except the following averment therein contained, to wit: "where she has a lawful right to be and remain peaceably without disturbance." This is a mere conclusion of law and requires no answer. The defendant avers, however, that the right of the plaintiffs to be and remain peaceably without disturbance upon the said premises is subject to the legal right of the
20 defendant to exercise its privilege of mining and removing the coal from underneath the said premises in accordance with the agreement and reservation contained in the deed from the said defendant to Alexander Craig, the predecessor in title of the plaintiffs, said deed being set forth in full in the plaintiffs' bill in Paragraph 6 thereof, and if during the progress of such mining operations by the defendant as may be necessary for it to enjoy its property right in said coal by mining and removing the same, the plaintiffs shall elect to disregard said notice and fail to remove themselves and their household temporarily from the said premises, they thereby will assume the risk of all damage and injury that may result to them or to the members of their household by reason of their so remaining during the period of said mining and of the disturbance of the surface likely to result therefrom.

Twelfth. The defendant denies that its proposed mining operations are unlawful. It is admitted that the proposed mining of the defendant in accordance with its rights under the deed from it to Alexander Graig, plaintiffs' predecessor in title, is contrary to the Act of Assembly cited by the plaintiffs in the twelfth paragraph of said bill; defendant avers, however, that the said Act of Assembly is unconstitutional and void and of no effect for the reasons and upon the grounds more fully hereinafter set forth.

Thirteenth. The defendant further avers that the Act of Assembly approved the 27th day of May, 1921, entitled, "An Act regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties," is unconstitutional and void, in that, the title of said act does not clearly express the subject matter of the said Act of Assembly, contrary to Section 3, Article III of the Constitution of Pennsylvania, which provides as follows:

21 "No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

Fourteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void for the reason that it deprives the defendant of its property rights in its coal, contrary to Section 1 of Article 1 of the Constitution of Pennsylvania, said section providing as follows:

"All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."

Fifteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it impairs and destroys the obligation of the contract between the defendant and Alexander Craig under whom the plaintiffs claim, contrary to Section 17 of Article 1 of the Constitution of Pennsylvania, said section providing as follows:

"No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

Sixteenth. The said Act of Assembly upon which the plaintiffs claim is unconstitutional and void in that it takes the defendant's property without authority of law and without just compensation having been first made or secured therefor, contrary to Section 22 10 of Article 1 of the Constitution of Pennsylvania, said section providing, inter alia:

"No person shall, for the same offense, be twice put in jeopardy of life or limb, nor shall private property be taken or applied to public use, without authority of law, and without just compensation being first made or secured."

Seventeenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it is a local or special law regulating the business of mining and in that it applies to anthracite mining and does not apply to any other kind of mining, and in that its operation is limited to part only of that small section of the State of Pennsylvania in which the business of mining anthracite coal is conducted, contrary to Section 7 of Article III of the Constitution of Pennsylvania, said section providing, inter alia, as follows:

"The general assembly shall not pass any local or special law
* * * regulating labor, trade, mining or manufacturing."

Eighteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it is a local or special law, contrary to Section 7 of Article III of the Constitution of Pennsylvania, as quoted in Paragraph 17 hereof, in that in Section 6 of said Act of Assembly there are exempted from the operation of the said act, townships of the second class without lawful warrant or basis in fact for said exception or classification. There are many townships of

23 the second class in the portions of the Commonwealth where anthracite coal mining is carried on, and in said townships there are public buildings and structures customarily used by the public as places of resort, assemblage and amusement, including churches, schools, hospitals, theatres, hotels and railroad stations; streets, roads, bridges and other public passageways dedicated to public use or habitually used by the public; tracks, roadbeds, rights-of-way, pipes, conduits, wires and other facilities used in the service of the public by municipal corporations or public service companies, dwellings and others structures used as human habitations, factories, stores and other industrial and mercantile establishments in which human labor is employed; and cemeteries and public burial grounds.

Nineteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it impairs the obligation of the contract between Alexander Craig, the plaintiffs' deviser, and the defendant, in the deed from the defendant to the said Alexander Craig, set forth in plaintiffs' bill in Paragraph 6 thereof, contrary to Section 10 of Article I of the Constitution of the United States of America, the said section providing, inter alia, as follows:

"No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Twentieth. The said Act of Assembly upon which the plaintiffs rely in this case is unconstitutional and void in that it deprives the defendant of its property without due process of law, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States of America, the said section providing, inter alia, as follows:

24 "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Twenty-first. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void for the reason that it denies to the defendant the equal protection of the laws, contrary to the provisions of Section 1 of Article XIV of the Constitution of the United States of America, hereinabove set forth.

Twenty-second. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it deprives the defendant of its property without just compensation therefor, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States, hereinbefore set forth.

Twenty-third. The said Act of Assembly is unconstitutional and void because it is so general, indefinite and vague in its terms as to be incapable of enforcement, particularly as to the criminal and penal provisions thereof.

Twenty-fourth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void because it is contrary to the Constitution of Pennsylvania in respects other than those hereinbefore specifically set forth.

Twenty-fifth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void because it is contrary to the Constitution of the United States of America in respects other than those hereinbefore specifically set forth.

25 Wherefore, the defendant, having fully answered the plaintiff's bill, prays to be hence dismissed with its reasonable costs in this behalf most unjustly sustained.

And it will ever pray, etc.

PENNSYLVANIA COAL COMPANY,
By REESE H. HARRIS,
HENRY S. DRINKER, JR.,
WILLIAM S. JENNEY,
FRANK W. WHEATON,
Its Solicitors.

COUNTY OF LACKAWANNA,
State of Pennsylvania, ss:

W. A. May, being duly sworn, deposes and says, that he is President of the Pennsylvania Coal Company, the above named defendant, and that the averments of the foregoing answer are true and correct as he is informed and verily believes.

W. A. MAY.

Sworn and subscribed to before me this 27 day of September, 1921.

[Notarial Seal.]

F. H. COUGHLIN,
Notary Public.

My commission expires January 19, 1923.

Endorsement: For the Court. In the Court of Common Pleas of Luzerne County. Sitting in Equity. No. 11, October Term 1921. Between H. J. Mahon and Margaret Craig Mahon, Plaintiffs, and Pennsylvania Coal Company, Defendant. Defendant's Answer. Reese H. Harris, 600 Connell Bldg., Scranton, Pa.; Henry S. Drinker, Jr., 750 Bullitt Bldg., Philadelphia, Pa.; William S. Jenny, 90 West Street, New York, N. Y.; Frank W. Wheaton, 133 No. River Street, Wilkes-Barre, Pa., Solicitors for Defendant.

26 In the Court of Common Pleas of Luzerne County, October Term, 1921.

No. —.

Between

H. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,

VS.

PENNSYLVANIA COAL COMPANY.

Injunction Affidavit.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

John W. Berry, being duly sworn according to law deposes and says that H. J. Mahon and Margaret Craig Mahon, his wife, are citizens of the State of Pennsylvania and residents of the City of Pittston, a city of the third class, in the County of Luzerne and State of Pennsylvania; that the Pennsylvania Coal Company is a corporation of the State of Pennsylvania duly authorized to conduct and carry on the business of owning, leasing and operating coal lands in Pennsylvania and is now and for many years past has been engaged in said business in said City of Pittston and County of Luzerne, that said H. J. Mahon and Margaret Craig Mahon, his wife, are the owners in fee simple as tenants by the entirety of improved lands ninety feet wide in front on the East side of Prospect Street in said City of Pittston and approximately one hundred and eighty feet in depth, which lands they acquired by deed from S. M. Parke and Bertha L. Parke, his wife, dated November 28, 1917, and recorded in Luzerne County Recorder's Office in Deed Book No. 518, Page 344; that the title so acquired is based upon a conveyance of said lands from said Pennsylvania Coal Company to Alexander Craig, dated February 7, 1878, and recorded in Luzerne County Recorder's Office in Deed Book No. 217, Page 357, in which said company excepted and reserved therefrom all the coal and other minerals under, in or upon said lot of land with the right and privilege of mining and removing the same, and in which said grantee waived all claim upon said company for any injury or damage that may hereafter arise from the mining out of said coal under said lands; that said lands at the time of said last mentioned conveyance thereof was and still is underlaid with strata of anthracite coal, and at the time of said conveyance said company was the owner of both the surface of said lands and the said coal underlying the same; that after said conveyance was made to said Alexander Craig he erected thereon a two-story frame dwelling house and other improvements and for many years and up to the time of his death in 1910 occupied the same as a dwelling house from which date said

H. J. Mahon and his wife, Margaret Craig Mahon, have occupied and are now occupying said premises and said dwelling house as a place of human habitation for themselves and the other members of their household; that on September 2, 1921, said Pennsylvania Coal Company served upon said H. J. Mahon and his wife, Margaret Craig Mahon, a notice in writing stating that in the course of its mining operations underneath said premises would reach a point on the 15th day of September, 1921, where the removal of further quantities of coal would so weaken the subjacent support of said premises as to cause subsidence of and injury to the surface of said lands and to the improvements thereon and the said owners should take steps as might be necessary for the safety of themselves and the members of their household as well as said dwelling house; that the removal of further quantities of coal from beneath said premises will cause the caving in, collapse and subsidence of the surface of

28 said lands and injury to the dwelling house and improvements thereon and will compel said owners to remove from said premises or run the risk of serious personal injury to themselves and members of their household; that said proposed removal of said coal by said company is in violation of the Act of assembly of Pennsylvania, approved May 27, 1921, entitled "An Act regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties"; and that by reason of the foregoing stated facts said owners are in need of equitable relief.

JOHN W. BERRY.

Sworn and subscribed before me Sept. 3, 1921.

R. E. BOWKLEY,
Notary Public.

Commission expires May 14th, 1923.

Endorsement: No. 11 October Term, 1921. Between H. J. Mahon and Margaret Craig Mahon, Plaintiffs, vs. Pennsylvania Coal Company. Injunction Affidavit. Filed 8 Sept., 1921. W. L. Pace, Attorney-at-Law, Pittston, Pa.

29 In the Court of Common Pleas of Luzerne County, October Term, 1921.

No. —.

Between

H. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,

vs.

PENNSYLVANIA COAL COMPANY.

Injunction Affidavit.

STATE OF PENNSYLVANIA,
County of Luzerne, ss:

A. C. Shoemaker, being duly sworn according to law deposes and says that H. J. Mahon and Margaret Craig Mahon, his wife, are citizens of the State of Pennsylvania and residents of the City of Pittston, a city of the third class, in the County of Luzerne and State of Pennsylvania; that the Pennsylvania Coal Company is a corporation of the State of Pennsylvania duly authorized to conduct and carry on the business of owning, leasing and operating coal lands in Pennsylvania and is now and for many years past has been engaged in said business in said City of Pittston and County of Luzerne, that said H. J. Mahon and Margaret Craig Mahon, his wife, are the owners in fee simple as tenants by the entirety of improved lands ninety feet wide in front on the East side of Prospect Street in said City of Pittston and approximately one hundred and eighty feet in depth, which lands they acquired by deed from S. M. Parke and Bertha L. Parke, his wife, dated November 28, 1917, and recorded in Luzerne County Recorder Office in Deed Book No. 518, Page 344; that the title so acquired is based upon a conveyance of said lands from said Pennsylvania Coal Company to Alexander Craig, dated February 7, 1878, and recorded in Luzerne County Recorder's Office in Deed Book No. 217, Page 357, in which said company excepted and reserved therefrom all the coal and other minerals under, in or upon said lot of land with the right and privilege of mining and removing the same, and in which said grantee waived all claim upon said company for any injury or damage that may hereafter arise from the mining out of said coal under said lands; that said lands
30 at the time of said last mentioned conveyance thereof was and still is underlaid with strata of Anthracite coal, and at the time of said conveyance said company was the owner of both the surface of said lands and the said coal underlying the same; that after said conveyance was made to said Alexander Craig he erected thereon a two-story frame dwelling house and other improvements and for many years and up to the time of his death in 1910 occupied the same as a dwelling house from which date said H. J. Mahon and his wife, Margaret Craig Mahon, have occupied and are now occupying said premises and said dwelling house as a place of human habi-

tation for themselves and the other members of their household; that on September 2, 1921, said Pennsylvania Coal Company served upon said H. J. Mahon and his wife, Margaret Craig Mahon, a notice in writing stating that it in the course of its mining operations underneath said premises would reach a point on the 15th day of September, 1921, where the removal of further quantities of coal would so weaken the subjacent support of said premises as to cause subsidence of and injury to the surface of said lands and to the improvements thereon and the said owners should take steps as might be necessary for the safety of themselves and the members of their household as well as said dwelling house; that the removal of further quantities of coal from beneath said premises will cause the caving in, collapse and subsidence of the surface of said lands and injury to the dwelling house and improvements thereon and will compel said owners to remove from said premises or run the risk of serious personal injury to themselves and members of their household; that said proposed removal of said coal by said company is in violation of the Act of assembly of Pennsylvania, approved May 27, 1921, entitled "An Act
 31 regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties"; and that by reason of the foregoing stated facts said owners are in need of equitable relief.

A. C. SHOEMAKER.

Sworn and subscribed before me Sept. 3, 1921.

R. E. BOWKLEY,
Notary Public.

Commission expires May 14th, 1923.

Endorsement: No. 11 October Term, 1921. Between H. J. Mahon and Margaret Craig Mahon, Plaintiffs, vs. Pennsylvania Coal Company. Injunction Affidavit. Filed 8 Sept., 1921. W. L. Pace, Attorney-at-Law, Pittston, Pa.

32 LUZERNE COUNTY, ss:

October Term, 1921.

In Equity.

No. 11.

H. J. MAHON and MARGARET CRAIG MAHON, His Wife,
 vs.

THE PENNSYLVANIA COAL CO.

Hearing on Motion to Continue Preliminary Injunction.

Decision.

On sworn bill filed September 8th, 1921, a preliminary injunction was granted and is still operative, restraining the defendant from

causing the caving-in, collapse or subsidence of plaintiff's dwelling by removal of coal or otherwise in its mining operations.

The claimed right of relief is based exclusively upon the Act of May 27, 1921, effective August 27, 1921, entitled "An Act regulating the mining of anthracite coal, prescribing duties for certain municipal officers, and imposing penalties," commonly known as "the Kohler Law," designed to furnish certain preventive protection against surface injuries incident to the mining of anthracite coal in this commonwealth, and providing inter alia, "that it shall be unlawful for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse or subsidence of * * * (d) any dwelling or other structure used as a human habitation" etc.

The answer, admitting all averments of fact in the bill, rests the case of defendant exclusively upon the alleged nullity of the said act as contravening the Constitution of Pennsylvania and of the United States in the respects: (1) Its title does not clearly express the subject, contrary to Sec. 3, Art. III, Constitution of Pennsylvania; (2) it deprives defendant of its property rights, contrary to Sec. 1, Art. I of same; (3) it impairs the obligation of a contract, contrary to Sec. 17, Art. I of same; (4) it takes defendant's property without compensation, contrary to Sec. 10, Art. I of same; (5) 33 it is a local or special law regulating mining, because it is restricted to anthracite mining, contrary to Sec. 7, Art. III of same; (6) it is also local or special because it excludes townships of the second class, contrary to the same; (7) it impairs the obligation of a contract, contrary to Sec. 10, Art. I, Constitution of the United States; (8) it deprives defendant of its property without due process of law, contrary to Sec. 1, Art. XIV, Constitution of the United States; (9) it denies defendant the equal protection of the laws contrary to same; (10) it deprives defendant of property without compensation, contrary to same; (11) it is so general, vague and indefinite as to be incapable of enforcement.

Answering the claim of unconstitutionality the plaintiffs stand entirely on the proposition of police power to sustain the Act.

The motion to continue the preliminary injunction was submitted to the Court on the bill and answer without further evidence, though with a great abundance of exceptionally able written argument not only by counsel for the immediate parties, but also by counsel for the City of Scranton and for the Scranton Surface Protective Association, vitally concerned by reason of their well known local emergency, in the question of constitutionality which is at issue.

The facts are these:

1. The plaintiffs own and occupy a certain lot and dwelling in Pittston, this county, as a place of human habitation for themselves and their household.

2. They derive title thereto by will from Alexander Craig, father of plaintiff's wife, and he derived it directly by deed in 1878 from defendant company, then owner of coal and surface.

34 3. The said deed granted only "the surface or right of soil" of the lot, "excepting and reserving to the said Pennsylvania Coal Company, their successors and assigns all the coal and other minerals under, in or upon said lot of land. And also the right and privilege of mining and removing all the coal and other minerals under and upon said lot of land and of making and driving tunnels, passages and ways under the surface of said lot of land for the purpose of mining any coal owned by the said Pennsylvania Coal Company, their successors and assigns on said land or any adjoining lands as fully and entirely as if the said Pennsylvania Coal Company, their successors and assigns remained the owners in fee of said surface or right of soil, the said Pennsylvania Coal Company, not to transport the coal and other minerals hereby reserved upon the surface of said lot, but in all other respects to be at liberty to mine and remove the same and to make and drive tunnels, passages and ways under said surface of said lot without objection or hindrance, and not to be liable to the said Alexander Craig, his heirs or assigns to or for any injury or damages that may occur by reason of mining and removing said coal or other minerals or by reason of making and driving said tunnels, passages or ways. And it is hereby expressly understood by the party of the second part, that the said party of the first part have before the date of this conveyance and before the date of the agreement in pursuance of which this deed is made mined coal upon and under said lot and that the said party of the second part takes said lot as the same now is with all the risks attendant therefrom and waives all claim upon the party of the first part or their successors for any injury or damage that may hereafter arise from the mining out of said coal under said lot."

35 4. The defendant company in the proper exercise of its rights is now and for years has been engaged in mining and removing the anthracite coal which underlies the property; and on September 2nd, as a warning to afford opportunity for self protection, it notified the plaintiffs in writing that by September 15th, 1921, the mining would reach a point which would cause subsidence of the surface.

5. If not restrained by injunction the defendant company will mine the coal and thereby cause the caving-in, collapse and subsidence of the surface, together with the dwelling, entailing injury upon the plaintiffs.

We observe as a preliminary and incontestable proposition of law that the exception and reservation above quoted, as between the parties to the deed, their heirs and assigns, conveys the surface without the right of support, and leaves in the owner of the coal absolute right to remove the whole of the same free from all liability for injury thereby inflicted.

We also observe that the plaintiffs' bill contains no averment on which to base by implication or otherwise any finding of fact that any interest public or private is involved in the defendant's proposal to mine the coal except the private interest of the plaintiffs in the prevention of private injury.

Hence it is clear that the decision of this case on the facts and legal contentions above stated hinges strictly upon the narrow question whether the Legislature in the exercise of so-called police power, and in a case where no public interest is directly concerned, can constitutionally give to a private owner of surface the right of support against an owner of the underlying coal, thereby depriving
36 the latter of right to mine the same without leaving support, and thus abrogating without compensation the very contract by which the owner of the surface acquired the same from the owner of the coal.

Owing to the intellectual limitations of our old-fashioned mind, and sitting in a court of equity which is presumed to follow the fundamental law even when it conflicts with the comfort and security of individuals, we must confess our inability to perceive in the facts of this case any legitimate claim of the plaintiffs to the relief prayed.

Sure it is that they would have no standing without the aid of the statute.

Equally sure it is that the statute applied to the case stated in this bill impairs the obligation of a contract, and, for the private benefit of one, takes the use of private property from another without compensation.

And by a corollary almost too obvious for discussion it follows that the plaintiffs' claim for relief involves a palpable breach of the fundamental law.

We decide the matter at this stage and dissolve the injunction, on the sole ground that the statute in its application to this case involves an unconstitutional impairment of the contract, accompanied by the taking of private property for private benefit without compensation. Even within these narrow limits we abstain from elaboration of the argument, first, because the conclusion seems so plain, and, second, because thereby we shape the case with the smallest amount of delay for the speedy appeal to the Supreme Court which is desirable. We also abstain, in no spirit of indolent or cowardly evasion, however, from discussing or deciding the general
37 constitutionality of the statute in respect to any of its provisions on any of the grounds urged against it by the defendant. The Supreme Court on appeal from our decision thus rendered can, if it will, determine without our poor assistance, this momentous matter.

We are unable to perceive the slightest reason why we should carry our consideration further than we do by simply deciding that, on the ground above stated, the preliminary injunction should be and the same hereby is dissolved.

By the Court,

FULLER,
P. J.

W. L. Pace, Esq.,
H. J. Mahon, Esq.,
For Plaintiffs.

Reese H. Harris, Esq.,
Henry S. Drinker, Jr., Esq.,
William S. Jenney, Esq.,
Frank W. Wheaton, Esq.,
For Defendant.

Endorsement: In the Court of Common Pleas of Luzerne County. Sitting in Equity. No. 11, October Term, 1921. H. J. Mahon and Margaret Craig Mahon, his wife, vs. The Pennsylvania Coal Co. Hearing on motion to continue preliminary injunction. Decision. Filed 10 Oct., 1921.

38 In Court of Common Pleas of Luz. Co., Oct. T., 1921.

No. 11.

H. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,

vs.

PENNSYLVANIA COAL CO., Defendant.

Now, 19 December 1921, the plaintiffs above named respectfully except to the order and decree of the court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.

W. L. PACE,
Atty. for Plaintiff.

Now, 19 December 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

Endorsement: No. 11, Oct. T., 1921.—H. J. Mahon et al. v. Penna. Coal Co.—Exception & Bill.—Filed 19th Dec., 1921.—W. L. Pace, Atty. for Pliffs.

39 In Court of Common Pleas of Luz. Co., Oct. T., 1921.

No. 11.

H. J. MAHON, MARGARET CRAIG MAHON

VS.

PENNA. COAL CO.

Now, 17 October, 1921, the above entitled case is directed to be placed on Equity Trial List for Equity Court Term commencing week of October 24, 1921.

By the Court,
(Signed)

FULLER,
P. J.

Endorsement: No. 11. Oct. T., 1921.—Mahon vs. Penna. Coal Co.—Order.—Filed 17" Oct., 1921.

40 In Court of Common Pleas of Luzerne County, Oct. T., 1921.

In Equity.

No. 11.

H. J. MAHON and MARGARET CRAIG MAHON

VS.

PENNSYLVANIA COAL CO.

Now, 19th of October, 1921, the above-named plaintiffs, H. J. Mahon and Margaret Craig Mahon, by their counsel, H. J. Mahon and W. L. Pace, except to the decision and action of the Court in refusing and dissolving the preliminary injunction in said entitled case.

(Signed)

H. J. MAHON AND
W. L. PACE,
Solicitors for Plaintiffs.

Now, 19th October, 1921, the exception taken by plaintiffs to decision and action of the Court in refusing and dissolving the preliminary injunction in said foregoing entitled case, is noted and directed to be filed and bill is sealed.

(Signed)

HENRY A. FULLER, [SEAL.]
P. J.

Endorsement: No. 11, Oct. T., 1921.—Equity.—H. J. Mahon, Margaret Craig Mahon vs. Pennsylvania Coal Co.—Exception.

41 In Court of Common Pleas of Luz. Co., Oct. T., 1921.

In Equity.

No. 11.

H. J. MAHON, MARGARET CRAIG MAHON

vs.

PENNSYLVANIA COAL COMPANY.

Replication.

To the Honorable the Judges of said Court:

Now, 22 October, 1921, the plaintiffs join issue on the matters alleged in the answer of defendant.

H. J. MAHON,
MARGARET CRAIG MAHON,
By W. L. PACE, *Attorney.*

Endorsement: No. 11, Oct. T., 1921.—H. J. Mahon, Margaret Craig Mahon vs. Pennsylvania Coal Co.—In Equity.—Replication. Filed 22 Oct., 1921.

42 In the Court of Common Pleas of Luzerne County,
October Term, 1921, Sitting in Equity.

No. 11.

Between

M. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,
and

PENNSYLVANIA COAL COMPANY.

Stenographer's Record of Trial of Above-entitled Case Before Hon. J. B. Woodward, A. L. J., in Court-room No. 3, Court-house, Wilkes-Barre, Pennsylvania, Monday, October 24, 1921, at 10:00 o'clock a. m.

Appearances:

W. L. Pace, Esq.,
H. J. Mahon, Esq.,
For Plaintiffs.

Reese H. Harris, Esq.,
Henry S. Drinker, Jr., Esq.,
William S. Jenney, Esq.,
Frank W. Wheaton, Esq.,
P. F. O'Neill, Esq.,
For Defendant.

Mr. Pace: Plaintiff offers in evidence the pleadings in the case, plaintiff's bill of complaint, together with such portions of Defendant's answer as admit the averments contained in the plaintiffs' bill.

Plaintiffs offer in evidence paragraph 1 of plaintiffs' bill, as follows:

43 "First. That they are citizens of the State of Pennsylvania and residents of the City of Pittston, Luzerne County, Pennsylvania, the plaintiff H. J. Mahon, being the husband of the plaintiff Margaret Craig Mahon. The City of Pittston is a city of the third class."

And in connection therewith plaintiffs offer in evidence paragraph 1 of defendant's answer, as follows:

"First. The averments of the first paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 2 of the Plaintiffs' bill, as follows:

"Second. That the defendant, the Pennsylvania Coal Company, is a corporation of the State of Pennsylvania, with its principal office situate at Dunmore, Lackawanna County, Pennsylvania, duly authorized to conduct the business of owning, leasing and operating coal lands in the State of Pennsylvania, and in mining coal therefrom and preparing and shipping the same to market, and the said defendant is now and has been for many years past engaged in the said business in the County of Luzerne and City of Pittston, aforesaid, and in other counties of said State."

And in connection therewith plaintiffs offer in evidence paragraph 2 of Defendant's answer, as follows:

"Second. The averments of the second paragraph of the plaintiff's bill are admitted."

Plaintiffs offer in evidence paragraph 3 of the plaintiffs' bill, as follows:

44 "Third. The plaintiffs are and have been since 1917, the owners and in possession of a certain lot or parcel of land situate in the City of Pittston, aforesaid, said lot being ninety (90) feet in front on Prospect Street and approximately one hundred and eighty (180) feet in depth. The said parcel of land is more fully hereinafter described."

And in connection therewith plaintiffs offer in evidence paragraph 3 of Defendant's answer, as follows:

"Third. The averments of the third paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 4 of the plaintiffs' bill, as follows:

"Fourth. The plaintiffs acquired title to the land by deed from S. M. Parke and Bertha L. Parke, his wife, by deed dated November 28, 1917, recorded on the same day in the Recorder's Office of Luzerne County, in Deed Book No. 518, at page 344, and the said S. M. Parke acquired title to the said parcel by deed from Margaret Craig Mahon and H. J. Mahon, her husband, plaintiffs herein, by deed dated November 27, 1917, recorded November 28, 1917, in Luzerne County in Deed Book No. 518, at page 344, as by reference thereto will more fully and at large appear."

And in connection therewith plaintiffs offer in evidence paragraph 4 of Defendant's answer, as follows:

"Fourth. The averments of the fourth paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 5 of the plaintiffs' bill, as follows:

"Fifth. The plaintiff, Margaret Craig Mahon, acquired title to the said parcel of land by devise under the last will and testament of her father, Alexander Craig, who died on the 14th day of May, 1910. The said last will and testament of the said Alexander Craig, was duly probated in the Register's Office of Luzerne County, aforesaid, and provided, inter alia, as follows:

45 'Item 5. I hereby give and bequeath to my beloved daughter, Margaret Craig Mahon, all the residue of my estate, including my home and all its contents, all my real estate, bonds, stocks, notes, etc., but it is my wish that she shall not sell any part thereof without the approval of the other executors, and that when any such sale is made, the proceeds thereof to be reinvested in as safe securities as possible to the end that she may always be provided with sufficient income.'"

And in connection therewith plaintiffs offer in evidence paragraph 5 of Defendant's answer, as follows:

"Fifth. The averments of the fifth paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 6 of the plaintiffs' bill, as follows:

"Sixth. The said Alexander Craig acquired title to the said piece or parcel of land from the Pennsylvania Coal Company, by deed dated February 7, 1878, recorded in Luzerne County, January 21, 1880, in Deed Book 217, page 357. The said deed is as follows:

"This indenture, made the seventh day of February in the year of our Lord one thousand eight hundred and seventy-eight between The Pennsylvania Coal Company, of the first part, and Alexander Craig, of Pittston Borough, Luzerne County, Penna., of the second part.

Witnesseth that the said Pennsylvania Coal Company, for and in consideration of the sum of Six Hundred Dollars, lawful money of the United States of America unto them well and truly paid
46 by the said Alexander Craig, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged have granted, bargained, sold, aliened, enfeoffed, released, confirmed and by these presents do grant, bargain, sell, alien, enfeoff, release and confirm unto the said Alexander Craig, his heirs and assigns, the surface or right of soil of the following described lot, piece or parcel of land situate in the Borough of Pittston, in the Township of Pittston, County of Luzerne and State of Pennsylvania, bounded and described as follows, to wit: Beginning at a corner of lands of the Butler Coal Co., on a twenty feet alley; thence southwesterly by said alley about eighty feet to line of the north side of lot conveyed to Pittston Water Co., prolonged to said alley; thence by said line about 294 feet to a forty feet street; thence by said street about 90 feet to land of the Butler Coal Co., and thence by said land about 295 feet to place of beginning. Containing 25,000 square feet of land or thereabout.

Excepting and reserving to the said Pennsylvania Coal Company, their successors and assigns all the coal and other minerals under, in or upon said lot of land. And also the right and privilege of mining and removing all the coal and other minerals under and upon said lot of land and of making and driving tunnels, passages and ways under the surface of said lot of land for the purpose of mining any coal owned by the said Pennsylvania Coal Company, their successors and assigns on said land or any adjoining lands as fully and entirely as if the said Pennsylvania Coal Company, their
47 successors and assigns remained the owners in fee of said surface or right of soil, the said Pennsylvania Coal Company, not to transport the coal and other minerals hereby reserved upon the surface of said lot, but in all other respects to be at liberty to mine and remove the same and to make and drive tunnels, passages and ways under said surface of said lot without objection or hindrance, and not be liable to said Alexander Craig, his heirs or assigns to or for any injury or damages that may occur by reason of mining and removing said coal or other minerals or by reason of making and driving said tunnels passages or ways. And it is hereby expressly understood by the party of the second part, that the said party of the first part have before the date of this conveyance and before the date of the agreement in presence of which this deed is made mined coal upon and under said lot and that the said party of the second part takes said lot as the same now is with all the risks attendant therefrom and waives all claim upon the party of the first part or their successors for any injury or damage that may hereafter arise from the mining out of said coal under said lot.

Together with all and singular the rights, liberties, hereditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of the said Pennsylvania Coal Com-

pany, in law, equity or otherwise howsoever of, in and to the aforesaid surface or right of soil of said lot and every part thereof excepting and reserving as aforesaid.

To have and to hold the said surface or right of said lot hereditaments and premises hereby granted or mentioned and intended so to be with the appurtenances. Excepting and reserving as aforesaid unto the said Alexander Craig, his heirs and assigns to and for the only proper use and behoof of the said Alexander Craig, his heirs and assigns forever.

And the said Pennsylvania Coal Company, for themselves and their successors do by these presents covenant, grant and agree to and with the said Alexander Craig, his heirs and assigns that they the said Pennsylvania Coal Company, and their successors all and singular the hereditaments and premises herein above described and granted or mentioned and intended so to be with the appurtenances unto the said Alexander Craig, his heirs and assigns, against them, the said Pennsylvania Coal Company and their successors and against all and every person or persons whomsoever lawfully claiming or to claim the same or any part thereof, by, from, through or under them, the said Pennsylvania Coal Company, shall and will warrant and forever defend. Excepting and reserving as aforesaid.

In witness whereof the said Pennsylvania Coal Company have hereunto affixed their corporate seal Dated the day and year first above written.

[Penna. Coal Co. Seal.]

GEO. A. HOYT,
President.

Signed, sealed and delivered in presence of:
WILLIAM H. CLARKSON.

Received the day of the date of the above written indenture of the above named Alexander Craig, the sum of Six Hundred Dollars in full of the consideration money above mentioned.

Witness present,
WILLIAM H. CLARKSON.

STATE OF NEW YORK,
City and County of New York, ss:

Be it remembered that on the seventh day of February, A. D. one thousand eight hundred and seventy-eight before me, the subscriber, a commissioner appointed by the Governor of the State of Pennsylvania to take acknowledgments and proof of Deeds and other writings under seal in the City of New York, to be used and recorded in the said State of Pennsylvania with full power and authority to administer oaths and affirmations personally appeared Geo. A. Hoyt, Esq., President of the aforesaid Pennsylvania Coal Company and being duly sworn deposeth and saith that he was personally present at the execution of the above written indenture or deed of conveyance and saw the common seal of the said Pennsylvania Coal Company duly affixed thereto and that the seal so affixed thereto is the

common and corporate seal of the said Pennsylvania Coal Company and that the above written indenture or deed of conveyance was duly sealed and delivered by and as and for the act and deed of the said Pennsylvania Coal Company, for the uses and purposes therein mentioned and that the name of this deponent subscribed to the said deed as President of the said corporation in attestation of the due execution and delivery of the said deed is of this deponent's own proper and respective hand writing.

GEO. A. HOYT.

50 Sworn and subscribed the day and year last aforesaid before me. Witness my hand and seal.

[Comm'r's Seal.]

CHARLES NETTLETON,

Commissioner for Pennsylvania in New York.

117 Broadway, N. Y. City.

Recorded 21st January, 1880.

And in connection therewith plaintiffs offer in evidence paragraph 6 of Defendant's answer, as follows:

"Sixth. The averments of the sixth paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 7 of plaintiff's bill, as follows:

"Seventh. The said parcel of land described in the foregoing deed of conveyance to the said Alexander Craig, was and still is underlaid with strata of anthracite coal, and at the time of the said conveyance the Pennsylvania Coal Company was the owner both of the surface and the said anthracite coal underlying the same."

And in connection therewith plaintiffs offer in evidence paragraph 7 of Defendant's answer, as follows:

"Seventh. The averments of the seventh paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 8 of plaintiffs' bill, as follows:

51 "Eighth. After the conveyance of the said premises by the Pennsylvania Coal Company to Alexander Craig as aforesaid, the said Alexander Craig, erected thereon a two-story frame dwelling house and other improvements and for many years occupied the same as his dwelling house until his death in 1910, from which said date the plaintiffs have been and are at the present time occupying the said premises and the said dwelling house as a place of human habitation for themselves and the other members of their household."

And in connection therewith plaintiffs offer in evidence paragraph 8 of Defendant's answer, as follows:

"Eighth. The averments of the eighth paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 9 of plaintiffs' bill, as follows:

"Ninth. The Pennsylvania Coal Company, the defendant herein, is now and has been for several years past engaged in the mining out and removing of the anthracite coal underlying the said premises and preparing and shipping the same to market."

And in connection therewith plaintiffs offer in evidence paragraph 9 of Defendant's answer, as follows:

"Ninth. The averments of the ninth paragraph of the plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 10 of plaintiffs' bill, as follows:

"Tenth. On the 2nd day of September, 1921, the defendant, the Pennsylvania Coal Company, served a notice upon the plaintiffs in writing stating that it, the defendant, in the course of its mining operations underneath the said property would reach a point on the 15th day of September, 1921, where the removal of further quantities of coal would so weaken the subjacent support of the plaintiff's premises aforesaid as to cause subsidence of and damage and injury to the surface of said land and to the improvements thereon, and that the plaintiffs should take such steps as might be necessary for the safety of themselves and the members of their household, and also for the protection of the said dwelling house from injury by reason of said surface subsidence. A copy of said notice is herein set forth, made part hereof, and is as follows:

'Scranton, Pa., Sept. 1, 1921.

To H. J. Mahon and Mrs. Margaret Craig Mahon,
7 Prospect Place,
Pittston, Pa.

DEAR SIR AND MADAM:

You are hereby notified that the mining operations of the Pennsylvania Coal Company, beneath your premises will by September 15th, have reached a point which will then or shortly thereafter cause subsidence and disturbance to the surface of your lot.

Although in the deed to Alexander Craig, under which you hold, we expressly reserved the right to remove the coal under your lot without liability for damages which might be caused thereby, we desire to notify you of the situation so as to enable you to take

proper steps for the protection of your dwelling and for the safety of yourselves and the members of your household during the period when the disturbance will continue.

Yours very truly,

PENNSYLVANIA COAL COMPANY,
By W. A. MAY, *President.*"

And in connection therewith plaintiffs offer in evidence paragraph 10 of defendant's answer, as follows:

"Tenth. The averments of the tenth paragraph of plaintiffs' bill are admitted."

Plaintiffs offer in evidence paragraph 11 of plaintiff's bill, as follows:

"Eleventh. Plaintiffs further aver that the removal of the said further quantities of coal by the mining operations of the defendant will result in a removal of the subjacent support of plaintiffs' premises, and thereby cause the caving in, collapse or subsidence of the surface of plaintiffs' said lot and damage and injury to the dwelling house thereon situate, and will compel the plaintiffs either to remove themselves and their family from their said dwelling house where they have a lawful right to be and remain peaceably without disturbance, or run the risk of serious personal injury to themselves and the members of their household in case they chose to remain thereon during said mining operations."

And in connection therewith plaintiffs offer in evidence paragraph 11 of Defendant's answer, as follows:

"Eleventh. The averments of the eleventh paragraph of the plaintiffs' bill are admitted except the following averment therein contained, to wit: 'where she has a lawful right to be and remain peaceably without disturbance.' This is a mere conclusion of law and requires no answer. The defendant avers, however, that the right of the plaintiffs to be and remain peaceably without disturbance upon the said premises is subject to the legal right of the defendant to exercise its privilege of mining and removing the coal from underneath the said premises in accordance with the agreement and reservation contained in the deed from the said defendant to Alexander Craig, the predecessor in title of the plaintiffs, said deed being set forth in full in the plaintiffs' bill in Paragraph 6 thereof, and if during the progress of such mining operations by the defendant as may be necessary for it to enjoy its property right in said coal by mining and removing the same, the plaintiffs shall elect to disregard said notice and fail to remove themselves and their household temporarily from the said premises, they thereby will assume the risk of all damage and injury that may result to them or to the members of their household by reason of their so remaining during the period of said mining and of the disturbance of the surface likely to result therefrom."

Plaintiffs offer in evidence paragraph 12 of Plaintiffs' bill, as follows:

"Twelfth. The plaintiffs aver that the said proposed further mining operations of the defendant about to be undertaken pursuant to the notice above set forth for the purpose of mining out and remov-

ing defendant's coal from under plaintiffs' premises are unlawful, being in violation of that certain Act of Assembly of Pennsylvania, approved the 27th day of May, 1921, entitled 'An Act regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties.' "

And in connection therewith plaintiffs offer in evidence paragraph 12 of Defendant's answer, as follows:

"Twelfth. The defendant denies that its proposed mining operations are unlawful. It is admitted that the proposed mining of the defendant in accordance with its rights under the deed from it to Alexander Craig, plaintiffs' predecessor in title, is contrary to the Act of Assembly cited by the plaintiffs in the twelfth paragraph of said bill; defendant avers, however, that the said Act of Assembly is unconstitutional and void and of no effect for the reasons and upon the grounds more fully hereinafter set forth."

Plaintiff rests.

Mr. Harris: There being no replication in this case, the defendant offers in evidence the averments of its answer, paragraphs one to twenty-five inclusive, as follows:

"The Pennsylvania Coal Company, the above named defendant, manifold errors in said bill contained, for answer thereto or to such saving and reserving to itself all and all manner of exceptions to the parts thereof as it is advised it is material and necessary for it to answer, says:

First. The averments of the first paragraph of the plaintiffs' bill are admitted.

Second. The averments of the second paragraph of the plaintiffs' bill are admitted.

Third. The averments of the third paragraph of the plaintiffs' bill are admitted.

Fourth. The averments of the fourth paragraph of the plaintiffs' bill are admitted.

Fifth. The averments of the fifth paragraph of the plaintiffs' bill are admitted.

Sixth. The averments of the sixth paragraph of the plaintiffs' bill are admitted.

Seventh. The averments of the seventh paragraph of the plaintiffs' bill are admitted.

Eighth. The averments of the eighth paragraph of the plaintiffs' bill are admitted.

Ninth. The averments of the ninth paragraph of the plaintiffs' bill are admitted.

Tenth. The averments of the tenth paragraph of the plaintiffs' bill are admitted.

Eleventh. The averments of the eleventh paragraph of the plaintiffs' bill are admitted except the following averment therein contained, to wit: 'where she has a lawful right to be and remain peaceably without disturbance.' This is a mere conclusion of law and requires no answer. The defendant avers, however, that the right of the plaintiffs to be and remain peaceably without disturbance upon the said premises is subject to the legal right of the defendant to exercise its privilege of mining and removing the coal from underneath the said premises in accordance with the agreement and reservation contained in the deed from the said defendant to Alexander Craig, the predecessor in title of the plaintiffs, said deed being set forth in full in the plaintiffs' bill in paragraph 6 thereof, and if during the progress of such mining operations by the defendant as
57 may be necessary for it to enjoy its property right in said coal by mining and removing the same, the plaintiffs shall elect to disregard said notice and fail to remove themselves and their household temporarily from the said premises, they thereby will assume the risk of all damage and injury that may result to them or to the members of their household by reason of their so remaining during the period of said mining and of the disturbance of the surface likely to result therefrom.

Twelfth. The defendant denies that its proposed mining operations are unlawful. It is admitted that the proposed mining of the defendant in accordance with its rights under the deed from it to Alexander Craig, plaintiffs' predecessor in title, is contrary to the Act of Assembly cited by the plaintiffs in the twelfth paragraph of said bill; defendant avers, however, that the said Act of Assembly is unconstitutional and void and of no effect for the reasons and upon the grounds more fully hereinafter set forth.

Thirteenth. The defendant avers that the Act of Assembly approved the 27th day of May, 1921, entitled 'An Act regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties,' is unconstitutional and void, in that the title of said act does not clearly express the subject matter of the said Act of Assembly, contrary to Section 3, Article III, of the Constitution of Pennsylvania, which provides as follows:

'No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.'

Fourteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void for the reason that it deprives the
58 defendant of its property rights in its coal, contrary to Section 1 of Article 1 of the Constitution of Pennsylvania, said section providing as follows:

'All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possession, and protecting property and reputation, and of pursuing their own happiness.'

Fifteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it impairs and destroys the obligation of the contract between the defendant and Alexander Craig under whom the plaintiffs claim, contrary to Section 17 of Article 1 of the Constitution of Pennsylvania, said section providing as follows:

'No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed.'

Sixteenth. The said Act of Assembly upon which the plaintiffs claim is unconstitutional and void in that it takes the defendant's property without authority of law and without just compensation having been first made or secured therefor, contrary to Section 10 of Article 1 of the Constitution of Pennsylvania, said section, providing, *inter alia*:

'No person shall, for the same offense, be twice put in jeopardy of life or limb, nor shall private property be taken or applied to public use, without authority of law, and without just compensation being first made or secured.'

59 Seventeenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it is a local or special law regulating the business of mining and in that it applies to anthracite mining and does not apply to any other kind of mining, and in that its operation is limited to part only of that small section of the State of Pennsylvania in which the business of mining anthracite coal is conducted, contrary to Section 7 of Article III of the Constitution of Pennsylvania, said section providing, *inter alia* as follows:

'The general assembly shall not pass any local or special law
* * * regulating labor, trade, mining or manufacturing.'

Eighteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it is a local or special law contrary to Section 7 of Article III of the Constitution of Pennsylvania, as quoted in Paragraph 17 hereof, in that in Section 6 of said Act of Assembly there are exempted from the operation of the said act, townships of the second class without lawful warrant or basis in fact for said exception or classification. There are many townships of the second class in the portions of the Commonwealth where anthracite coal mining is carried on, and in said townships there are public buildings and structures customarily used by the public as places of resort, assemblage and amusement, including

churches, schools, hospitals, theaters, hotels and railroad stations; streets, roads, bridges and other public passageways dedicated to public use or habitually used by the public; tracks, roadbeds, rights-of-way, pipes, conduits, wires and other facilities used in the service of the public by municipal corporations or public service companies, dwellings and other structures used as human habitations, factories, stores and other industrial and mercantile establishments in
 60 which human labor is employed; and cemeteries and public burial grounds.

Nineteenth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it impairs the obligation of the contract between Alexander Craig, the plaintiff's devisor, and the defendant, in the deed from the defendant to the said Alexander Craig, set forth in plaintiffs' bill in paragraph 6 thereof to Section 10 of Article 1 of the Constitution of the United States of America, the said section providing, *inter alia*, as follows:

'No state shall * * * pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.'

Twentieth. The said Act of Assembly upon which the plaintiffs rely in this case is unconstitutional and void in that it deprives the defendant of its property without due process of law, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States of America, the said section providing, *inter alia*, as follows:

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'

Twenty-first. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void for the reason that it denies to the defendant the equal protection of the laws, contrary to
 61 the provisions of Section 1 of Article XIV of the Constitution of the United States of America, hereinabove set forth.

Twenty-second. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void in that it deprives the defendant of its property without just compensation therefor, contrary to Section 1 of Article XIV of the Amendments to the Constitution of the United States, hereinbefore set forth.

Twenty-third. The said Act of Assembly is unconstitutional and void because it is so general, indefinite and vague in its terms as to be incapable of enforcement, particularly as to the criminal and penal provisions thereof.

Twenty-fourth. The said Act of Asembly upon which the plaintiffs rely is unconstitutional and void because it is contrary to the Constitution of Pennsylvania in respects other than those herein before specifically set forth.

Twenty-fifth. The said Act of Assembly upon which the plaintiffs rely is unconstitutional and void because it is contrary to the Constitution of the United States of America in respects other than those hereinbefore specifically set forth."

Defendant rests.

Certificate.

I hereby certify that the proceedings, evidence and rulings of the Court are contained fully and accurately in the notes taken by me on the trial of above cause, and that the foregoing is a true and correct transcript of the same.

W. J. YEISLEY,
Official Stenographer.

62 The foregoing record is hereby approved and directed to be filed.

— — —
Judge.

Endorsement: In Equity.—No. 11, October Term, 1921.—Between M. J. Mahon and Margaret Craig Mahon, Plaintiffs, and Pennsylvania Coal Company.—Stenographer's Record.—Lodged 26 Oct., 1921.

63 LUZERNE COUNTY, ss:

October Term, 1921.

In Equity.

No. 11.

H. J. MAHON and WIFE

vs.

THE PENNSYLVANIA COAL COMPANY.

Trial on Bill and Answer.

Decision.

The aspect of this case at the present time is precisely the same as upon motion to continue the preliminary injunction which was dissolved by decision rendered October 10th, 1921. That decision was rendered exclusively upon the facts as determined by bill and answer and the case now is submitted in the same manner.

Therefore, we still stand upon that decision believing any further elaboration or discussion to be unprofitable and unnecessary.

We reiterate as follows our findings of Fact.

1. The plaintiffs own and occupy a certain lot and dwelling in Pittston, this County, as a place of human habitation for themselves and their household.

2. They derive title thereto by will from Alexander Craig, father of plaintiff wife, and he derived it directly by deed in 1878 from defendant company, then owner of coal and surface.

3. The said deed granted only "the surface or right of soil" of the lot, "excepting and reserving to the said Pennsylvania Coal Company, their successors and assigns all the coal and other minerals under, in or upon said lot of land; and also the right and privilege of mining and removing all the coal and other minerals under and upon said lot of land and of making and driving tunnels, passages and ways under the surface of said lot of land for the purpose of mining any coal owned by the said Pennsylvania Coal Company, their successors and assigns on said land or any adjoining lands as fully and entirely as if the said Pennsylvania Coal Company, their successors and assigns remained the owners in fee of said surface or right of soil, the said Pennsylvania Coal Company not to transport the coal and other minerals hereby reserved upon the surface of said lot, but in all other respects to be at liberty to mine and remove the same and to make and drive tunnels, passages and ways under said surface of said lot without objection or hindrance, and not to be liable to the said Alexander Craig, his heirs or assigns to or for any injury or damages that may occur by reason of mining and removing said coal or other minerals or by reason of making and driving said tunnels, passages or ways. And it is hereby expressly understood by the party of the second part, that the said party of the first part have before the date of this conveyance and before the date of the agreement in pursuance of which this deed is made mined coal upon and under said lot and that the said party of the second part takes said lot as the same now is with all the risks attendant therefrom and waives all claim upon the party of the first part or their successors for any injury or damage that may hereafter arise from the mining out of said coal under said lot."

4. The defendant company in the proper exercise of its rights is now and for years has been engaged in mining and removing the anthracite coal which underlies the property; and on September 2nd, as a warning to afford opportunity for self protection, it notified the plaintiffs in writing that by September 15th, 1921, the mining would reach a point which would cause subsidence of the surface.

5. If not restrained by injunction the defendant company will mine the coal and thereby cause the caving-in, collapse and subsidence of the surface, together with the dwelling, entailing injury upon the plaintiffs.

And we also reiterate our findings of law.

1. The exception and reservation above quoted, as between the parties to the deed, their heirs and assigns, conveys the surface without the right of support, and leaves in the owner of the coal absolute right to remove the whole of the same free from all liability for injury thereby inflicted.

2. The plaintiffs' bill contains no averment and there is no proof on which to base by implication or otherwise any finding of fact that any interest public or private is involved in the defendant's proposal to mine the coal except the private interest of the plaintiffs in the prevention of private injury.

3. The plaintiffs confessedly have no standing without aid of the Act "regulating the mining of anthracite coal, &c." commonly known as the "Kohler law," approved May 27, 1921, effective August 27, 1921.

4. But they can derive no legitimate aid from that Act because its application to the facts in this case would involve insuperable constitutional objections by impairing the obligation of a contract and by taking private property for private use without compensation.

66 5. The bill should be dismissed at the cost of the plaintiffs.

The Prothonotary will enter and give notice of the following

Decree Nisi.

Now, November 7th, 1921, this cause came on to be heard at this Term, and was argued by counsel, and upon consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.

By THE COURT.

W. L. Pace,
H. J. Mahon,
For Plaintiffs.

Reese H. Harris,
Henry S. Drinker, Jr.,
William S. Jenney,
Frank W. Wheaton,
P. F. O'Neill,
For Defendant.

Endorsement: In C. P. of Luzerne County Sitting in Equity. No. 11, October Term, 1921. H. J. Mahon and wife, vs. The Pennsylvania Coal Co. Trial on bill and answer. Decision. Filed 7 Nov., 1921.

67 In the Court of Common Pleas of Luzerne County, October Term, 1921.

No. 11.

H. J. MAHON and MARGARET GRAIG MAHON, Plaintiffs,
vs.

PENNSYLVANIA COAL COMPANY.

Bill for Injunction.

Exceptions to Decree Nisi Filed in Above Case.

To the Honorable the Judges of said Court:

Plaintiffs above named, by their counsel, H. J. Mahon and W. L. Pace, respectfully except to the decree nisi filed in the above entitled case on the following designated grounds, to wit:

68 First. The Court erred in its conclusion of law when it stated that "We observe as a preliminary and incontestable proposition of law that the exception and reservation above quoted, as between the parties to the deed, their heirs and assigns, conveys the surface without the right of support, and leaves in the owners of the coal absolute right to remove the whole of the same free from all liability for injury thereby inflicted." Said conclusion of law in so far as it relates to "injury thereby inflicted" should be limited to injury to property right and does not extend to injury resulting in the maiming or death — either of the plaintiffs or other persons lawfully upon the premises, or using the public highway upon which the premises abut.

Second. The Court erred in its conclusion of law by stating "We also observe that the plaintiffs' bill contains no averment on which to base by implication or otherwise any finding of fact that any interest, public or private, is involved in the defendant's proposal to mine the coal, except the private interest of the plaintiffs in the prevention of private injury." Said conclusion is erroneous in that the bill sets forth the threatened danger of the collapse of a two-story dwelling fronting on Prospect Street, in the City of Pittston, and the threatened injury to life and limb of various persons as result thereof, with all of which matters the Commonwealth of Pennsylvania and the public at large are concerned.

69 Third. The Court erred in its conclusion of law, "Hence it is clear that the decision of this case on the facts and legal contention above stated hinges strictly upon the narrow question of whether the Legislature in the exercise of so-called "police power" and in a case where no public interest is directly concerned, can constitutionally give to a private owner of surface, the right of support against an owner of the underlying coal, thereby depriving the latter of the right to mine the same without leaving support, and

thus abrogating without compensation, the very contract by which the owner of the surface acquired the same from the owner of the coal." Said conclusion of law is erroneous in stating that no public interest is directly concerned and in stating that the contract waiving support is abrogated, whereas, it is merely modified to the extent of preventing its exercise in cases where human life would be put in jeopardy, to wit, in the present case by causing the collapse of a dwelling house used as a place of human habitation and covering only a comparatively small area of the land affected by the waiver. Said conclusion is further erroneous for the reason that it assumes that the private owner of the surface has been given the right of support, or, in other words, the right to recover damages for subsidences, whereas, the Act of the Legislature has not vested the private owner with any right to recover damages not previously possessed, but has merely declared that the right of the coal owner to cause the collapse of a dwelling house or place of human habitation shall not be exercised in cases where human life or limb might reasonably be expected to be placed in jeopardy.

Fourth. The Court erred in its decree because same violates the rights of the plaintiffs guaranteed them under Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

70 Fifth. The Court erred in declaring the Act of Assembly of the State of Pennsylvania, approved May 27, 1921, and entitled "An Act regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties," known as the Kohler Act, unconstitutional as applied to the facts of this case.

Sixth. The Court erred in declaring the Act of Assembly of the State of Pennsylvania, approved May 27, 1921, known as the Kohler Act aforesaid, unconstitutional and violative of the provisions of Section 10 of Article 1 of the Constitution of the United States of America which provides inter alia, that "No State shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Seventh. The Court erred in declaring that the Kohler Act was unconstitutional in depriving defendant company of its property without compensation and in holding that said Act was violative of the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

Eighth. The Court erred in holding that said Kohler Act appropriates private property to private use, whereas said Act merely regulates the manner of mining anthracite coal in the interest of the general welfare and public good.

71 Ninth. The Court erred in declaring in effect that the Legislature of Pennsylvania in the interest of the public welfare and because of the necessities and conditions described in said Act cannot constitutionally pass a police regulation, the effect of which might be the protection from subsidence as a result of reckless coal mining of plaintiffs' dwelling house and place of human habitation.

Tenth. The Court erred in refusing the injunction applied for in said case and in dissolving the same.

Eleventh. The Court erred in concluding as a matter of law that "The plaintiffs' bill contains no averment and there is no proof on which to base by implication or otherwise any finding of fact that any interest, public or private, is involved in the defendant's proposal to mine the coal except the private interest of the plaintiffs in the prevention of private injury."

Twelfth. The Court erred in declaring as a matter of law that the application of the Kohler law to the facts in the case would involve insuperable constitutional objections by impairing the obligation of a contract and by taking private property for private use without compensation.

Thirteenth. The Court erred in finding that no public interest is involved in the defendant's proposal to mine the anthracite coal underlying plaintiffs' dwelling house and place of human habitation and thereby causing the collapse and subsidence thereof.

72 Fourteenth. The Court erred in dismissing plaintiffs' bill of complaint filed in said case.

H. J. MAHON AND
MARGARET CRAIG MAHON,
By Their Counsel, H. J. MAHON.
W. L. PACE.

LUZERNE COUNTY, ss:

W. L. Pace, of counsel for plaintiffs, being duly sworn according to law, deposes and says that the foregoing exceptions are not filed for purpose of delay, but because he believes they raise questions of law requiring disposition by the Court, and because it is his belief that injustice has been done.

W. L. PACE.

Sworn and subscribed before me this 17th day of November, A. D. 1921.

EVAN J. WILLIAMS, JR.,
Prothonotary,
Per EDWARD W. NOLL,
Deputy.

Endorsement: Equity.—No. 11, Oct. Term, 1921.—H. J. Mahon and Margaret Craig Mahon vs. Pennsylvania Coal Company.—Plain-

tiffs' exceptions to decree nisi.—Filed 16 Nov. 1921.—W. L. Pace, Attorney-at-Law, Pittston, Pa.

73 In the Court of Common Pleas of Luzerne County,
Oct. Te., 1921.

(In Equity.)

No. 11.

H. J. MAHON, MARGARET CRAIG MAHON

vs.

THE PENNSYLVANIA COAL COMPANY.

Now, 19 December, 1921, I hereby certify that the amount in controversy in the above entitled case exceeds the sum of \$1,500.00.

By the Ct.

FULLER,
P. J.

Endorsement: No. 11, October T., 1921. Equity. Mahon vs. Penna. Coal Co. Certificate of amount in controversy. 2nd. Filed 19 Dec., 1921.

74 EASTERN DISTRICT,
City and County of Philadelphia, ss:

The Supreme Court of Pennsylvania.

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Luzerne, Greeting:

We being willing for certain causes, to be certified of the matter of the Appeal of H. J. Mahon and Margaret Craig Mahon from the decree of your said Court at No. 11 of October Term A. D. 1921, wherein the said appellants were Plaintiffs and Pennsylvania Coal Company was Defendant, in equity, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court of Pennsylvania, at a Supreme Court to be holden at Philadelphia, in and for the Eastern District, the second Monday of April next (1922), so full and entire as in your Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the Laws of the said State ought.

Witness, the Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our said Supreme Court at Philadelphia, the twenty-first day of December, in the year of our Lord one thousand nine hundred and twenty-one.

[SEAL.]

RUDOLPH M. SCHICK,
Prothonotary pro Tem.

To the honorable the justices of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

HENRY J. FULLER, [SEAL.]
P. J.

[Endorsed:] No. 11, October Term, 1921. C. P. Luzerne Co. (In Equity.) No. 290, January Term, 1922. Supreme Court. H. J. Mahon and Margaret Craig Mahon, Appellants, v. Pennsylvania Coal Company. Certiorari to the Court of Common Pleas for the County of Luzerne. Returnable the second Monday of April 1922. Rule on the Appellee, to appear and plead on the Return-day of the Writ. Rudolph M. Schick, Prothonotary pro tem. Filed 28 Dec., 1921. Filed in Supreme Court April 10, 1922. Philadelphia. W. L. Pace, H. J. Mahon.

Now, December 28, 1921, Service of within Writ is hereby accepted and Appellee pleads thereto "In Nullo Est Erratum."

REESE H. HARRIS,
HENRY S. DRINKER, JR.,
WILLIAM S. JENNEY,
FRANK W. WHEATON,
Attorneys for Appellee.

75 290.

January Term, 1922.

290.

H. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,

v.

PENNSYLVANIA COAL COMPANY, Defendant.

In Equity.

No. 11, October Term, 1921.

Appeal of Plaintiffs from the Decree.

Appeal from Court Common Pleas of the County of Luzerne.

W. L. Pace.
H. J. Mahon.

Filed December 21, 1921.

Eo die—Certiorari exit Retble. second Monday April 1922.

April 10, 1922—Record returned & filed.

Et die—Assignments of Error filed.

March 10, 1922—Petition of Scranton Gas and Water Company to intervene, filed.

Et die—Petition of Scranton Surface Protective Association to intervene filed.

Et die—Petition of the City of Scranton to intervene, filed.

(The following order was made on each of the above petitions to intervene):

March 20, 1922—Prayer granted to this extent only: Petitioner may file paper book and participate by counsel at oral argument.

R. v. M.,
C. J.

March 20, 1922—Continued to head of list for April 17, 1922 (upon oral motion of Attorney).

March 30, 1922—Petition of the Attorney General on behalf of the Commonwealth of Pennsylvania to intervene, filed.

March 30, 1922—Prayer granted to this extent only: petitioner may file paper book and participate by counsel at oral argument.

R. v. M.,
C. J.

April 17, 1922—Argued.

June 24, 1922—The order appealed from is reversed and the bill reinstated; the record is remitted, and the court below is directed to enter a decree in accord with the views expressed in this opinion; appellee to pay the costs.

Opinion by Moschzisker, C. J.

Dissenting Opinion by Kephart, J.

76 July 12, 1922—Petition to Supreme Court for Writ of Error filed.

Reese H. Harris,

Henry S. Drinker, Jr.,

Frank H. Wheaton,

Attorneys for Plaintiff in Error.

After consideration of the foregoing petition for writ of error, it is ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of \$2,500.

Dated, Philadelphia, Pa., July 12, 1922.

ROBERT VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

July 12, 1922—Writ of Error to the Supreme Court of the United States filed in office. Allowed by Hon. Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania.

July 12, 1922—Citation brought into office.

July 12, 1922—Assignments of Error to the Supreme Court of the United States brought into office.

July 21, 1922—Bond for \$2,500 brought into office. Approved by Hon. Alex. Simpson, Jr., Associate Justice of the Supreme Court of Pennsylvania.

August 11, 1922—Transcript of record exit and sent to W. R. Stansbury, Clerk of the Supreme Court of the United States.

77 In the Supreme Court of Pennsylvania for the Eastern District.

Court of Common Pleas of the County of Luzerne, Sitting in Equity, October Term, 1921.

No. 11.

Between

H. J. MAHON and MARGARET CRAIG MAHON, Plaintiffs,
and

PENNSYLVANIA COAL COMPANY, Defendant.

Enter appeal on behalf of H. J. Mahon and Margaret Craig Mahon, plaintiffs, from the decree of the Court of Common Pleas of the County of Luzerne.

W. L. PACE,
H. J. MAHON,
Attorneys for Appellant.

Rudolph M. Schick, Prothonotary.

COUNTY OF LUZERNE, ss:

Supreme Court, Eastern District.

H. J. Mahon and Margaret Craig Mahon being duly sworn saith that said Appeal is not taken for the purpose of delay, but because Appellants believe they have suffered injustice by the decree from which they appeal.

H. J. MAHON.
MARGARET CRAIG MAHON.

Sworn and subscribed this 20th day of Dec., A. D. 1921.

[SEAL.]

MELANIE S. CONANT,
Notary Public.

My Com. expires Apr. 1, 1923.

[Endorsed:] No. 290. January Term, 1922. Supreme Court of Pennsylvania Eastern District. H. J. Mahon and Margaret Craig Mahon vs. Pennsylvania Coal Company. Appeal and Affidavit. Filed in Supreme Court Dec. 21 1921. Philadelphia, W. L. Pace, H. J. Mahon, Attorneys for Appellants.

- 78 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922.

In Equity.

No. 290.

H. J. MAHON and MARGARET CRAIG MAHON, His Wife, Appellants,

vs.

THE PENNSYLVANIA COAL COMPANY, Appellee.

Motion of C. La Rue Munson and Edgar Munson, Members of the Bar of This Court, for Leave to File Brief as Amici Curiae on Behalf of the Scranton Gas and Water Company and Notice and Service of Motion and Notice.

C. La Rue Munson,
Edgar Munson,
Williamsport, Pa.

March 2nd, 1922.

- 79 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922.

In Equity.

No. 290.

H. J. MAHON and MARGARET CRAIG MAHON, His Wife, Appellants,

vs.

THE PENNSYLVANIA COAL COMPANY, Appellee.

Motion of C. La Rue Munson and Edgar Munson, Members of the Bar of This Court, for Leave to File Brief as Amici Curiae on Behalf of the Scranton Gas and Water Company and Notice and Service of Motion and Notice.

Now come C. La Rue Munson and Edgar Munson, members of the Bar of this Court, and ask leave of the Court to file a Brief as Amici Curiae on behalf of the Scranton Gas and Water Company in support of the constitutionality of the Act of Assembly, known as the Kohler Act, approved May 27th, 1921, P. L. 1198.

The Scranton Gas and Water Company is a public service corporation serving the public in the City of Scranton and neighboring communities in the anthracite mining district in Lackawanna County.

For many years the numerous subsidences of the surface over the anthracite coal mines in the territory occupied by the reservoirs, filter plants and service mains of the Scranton Gas and Water Company caused by the mining operations thereunder have resulted in frequent and repeated bursting and leakage of its mains not only to the great serious damage of its own property, but to the inconvenience of the public served by it; and have entailed upon the Company an annual expenditure of nearly One Hundred Thousand Dollars (\$100,000) to repair such breaks in its mains, etc.

In addition to the pecuniary loss sustained by the Company and its customers, the officers and the stockholders of the Company are greatly concerned as citizens over the ultimate effect upon the prospective growth of the regions supplied with water by the Company, upon the highways and buildings therein, and over the long continued and still continuing danger to and loss of life if the indiscriminate and unregulated methods of mining heretofore employed are not made subject to proper control such as is sought by the Act of Assembly (known as the Kohler Act) approved May 27th, 1921, P. L. 1198.

Wherefore, the said C. La Rue Munson and Edgar Munson pray that they may have leave to file a Brief as Amici Curie in behalf of the Scranton Gas and Water Company in support of the constitutionality of said Act of Assembly.

C. LA RUE MUNSON,
EDGAR MUNSON,
Members of the Bar of this Court.

Dated at Williamsport, Pa.,
March 2nd, 1922.

81 *Notice.*

To Counsel for appellants and appellee.

GENTLEMEN:

Take notice that on Monday, March 1922, (or as soon thereafter as the same may be heard by the Court), we will submit the foregoing motion to the Supreme Court of Pennsylvania at Philadelphia.

C. LA RUE MUNSON,
EDGAR MUNSON.

First National Bank Building,
Williamsport, Pa.

March —, 1922.

Service of Motion and Notice.

A copy of the foregoing Motion and Notice has been served on counsel for Appellant and on counsel for Appellee.

Williamsport, Pa.,
March —, 1922.

Endorsement: Supreme Court. 290, Jan., 1922. Mahon et al., Appts., vs. Penna. Coal Co. Petition to Intervene on behalf of Scranton Gas & Water Co. March 20, 1922. Prayer granted to this extent only: Petitioner may file paper book and participate by counsel at oral argument. R. von M., C. J. Candor & Munson Attorneys at Law, Williamsport, Pa. Filed in Supreme Court, Mar. 10, 1922. Philadelphia.

82 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922.

No. 290.

M. J. MAHON and MARGARET CRAIG MAHON, Appellants,

vs.

PENNSYLVANIA COAL COMPANY.

Petition to Intervene.

To the Honorable the Chief Justice and Justices of the Supreme Court of Pennsylvania:

The petition of Scranton Surface Protective Association respectfully represents:

1. The above captioned cause now pending in your Honorable Court is an appeal by the plaintiffs from a decree dismissing their bill in equity, which decree was entered by the Court of Common Pleas of Luzerne County to No. 11 October Term, 1921, in equity.

2. The appellants therein are citizens of the county of Luzerne and owners of land therein. The defendant below and appellee in this Court is Pennsylvania Coal Company, a corporation engaged in operating a mine or mines in Luzerne County, Pennsylvania.

3. The bill was filed in the Court below under the authority of the Act of May 27, P. L. 1198, entitled "An Act regulating the mining of anthracite coal; prescribing duties for certain municipal officers, and imposing penalties." The Court below dismissed the Bill upon

83 the ground that the said Act was unconstitutional and that therefore plaintiffs could not avail themselves of its provisions nor obtain relief under it.

4. In the court below your petitioner, Scranton Surface Protective Association, filed with the hearing judge a petition for leave to intervene. Said judge announced that he would not grant the petition to intervene, but would hear this petitioner on the oral argument and permit this petitioner to file briefs. As it turned out the hearing judge stated he did not care to hear oral argument on the part of any party, but your petitioner did file its brief with him, as did the actual parties to the record.

5. Your petitioner, Scranton Surface Protective Association, is a corporation of the first class duly organized and existing under the laws of this Commonwealth, its charter having been granted by the Court of Common Pleas of Lackawanna County. The purpose and object of said Association is to protect the lives and property of the citizens of the City of Scranton and the streets of said city from injury, loss and damage caused by mining and mine caves. Its membership consists of upwards of sixteen hundred citizens of the City of Scranton.

6. Your petitioner was, amongst other citizens and persons, natural and artificial, largely instrumental in procuring the passage by the Legislature of the said Act of May 27, 1921, as well as another Act of the same date, P. L. 1192, entitled, "An Act affecting anthracite coal mines and operations; establishing the Pennsylvania State Anthracite Mine Cave Commission; defining its jurisdictions and powers; imposing duties upon owners and operators of anthracite coal mines; and imposing penalties;" the said two Acts constituting together highly important remedial and preventive legislation for the protection of the public health and safety throughout those portions of the Commonwealth wherein anthracite coal is mined.

7. While the proceeding in question was brought in Luzerne County, the fact is that the county of Lackawanna and the citizens of that county, and more particularly of the city of Scranton, are more seriously affected at the present time by the conditions which said legislation was aimed to correct than the citizens of any other district or municipal division of the Commonwealth. Petitioner avers that millions of dollars of property and thousands of human lives may be affected by the decision in this appeal and that it is of great importance not only to your petitioner, but to the citizens and property holders of the district within which this petitioner is by law authorized to perform its activities, that your Honorable Court should have the fullest presentation of the questions involved upon the hearing of this appeal.

Wherefore your petitioner respectfully prays that it be allowed to intervene in this appeal on the part of the appellants therein, upon such terms as your Honorable Court shall deem fit, and that it be allowed to file its paper book in support of said appeal and to be heard by counsel at the argument thereof.

And your petitioner will ever pray, etc.

SCRANTON SURFACE PROTECTIVE
ASSOCIATION,

By W. J. LONG,
President.

Attest:

WM. LA FONTAINE,
Secretary.

COMMONWEALTH OF PENNSYLVANIA,
County of Lackawanna, ss:

W. J. Long, having been duly sworn according to law, doth depose and say that he is president of Scranton Surface Protective Association, the petitioner above named; that he is authorized to make this affidavit on behalf of said petitioner; that the facts set forth in the foregoing petition are just, true and correct to the best of his knowledge, information and belief. (X) W. J. LONG.

Sworn to and subscribed before me this 4th day of March A. D. 1922.

[SEAL.]

PHILIP V. MATTES,
Notary Public.

My commission expires Mch. 28, 1923.

85 Endorsement: Supreme Court of Pennsylvania, Eastern District. No. 290, January Term, 1922. H. J. Mahon and Margaret Craig Mahon, Appellants vs. Pennsylvania Coal Company. Petition to intervene on behalf of Scranton Surface Protective Association. March 20, 1922, prayer granted to this extent only: Petitioner may file paper book and participate by counsel at oral argument. R. v. M. C. J. Owen J. Roberts, Kaufman & Mattes, 707 Mears Building Scranton, Pa. Filed in Supreme Court March 10, 1922. Philadelphia.

86 In the Supreme Court of Pennsylvania, Eastern District
January Term, 1922.

No. 290.

In the Court of Common Pleas of Luzerne County,

October Term, 1921.

(In Equity.)

No. 11.

H. J. MAHON and MARGARET CRAIG MAHON, His Wife, Appellants
vs.

PENNSYLVANIA COAL COMPANY, Appellee.

Assignments of Error.

First. The Court below erred in dismissing by its final decree appellants' bill of complaint, which final decree with the exceptions thereto and bill sealed are as follows (Page 26, Appellants' Paper Book):

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Second. The Court below erred in dismissing appellants' first exception to its adjudication and decree nisi, which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows:

57

First Exception.

"The Court erred in its conclusion of law when it stated that 'We observe as a preliminary and incontestible proposition of law that the exception and reservation above quoted, as between the parties to the deed, their heirs and assigns, conveys the surface without the right of support, and leaves in the owners of the coal absolute right to remove the whole of the same free from all liability for injury thereby inflicted.' Said conclusion of law in so far as it relates to "injury thereby inflicted" should be limited to injury to property right and does not extend to injury resulting in the maiming or death either of the plaintiffs or other persons lawfully upon the premises, or using the public highway upon which the premises abut."

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: Now, November 7, 1921, this cause came on to be heard

at this term, and was argued by counsel, and upon consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.

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W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page —.)

Third. The Court below erred in dismissing appellants' second exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows:

Second Exception.

"The Court erred in its conclusion of law by stating 'We also observe that the plaintiffs' bill contains no averment on which to base by implication or otherwise any finding of fact that any interest, public or private, is involved in the defendant's proposal to mine the coal, except the private interest of the plaintiffs in the prevention of private injury.' Such conclusion is erroneous in that the bill sets forth the threatened danger of the collapse of a two-story dwelling fronting on Prospect Street, in the City of Pittston, and the threatened injury to life and limb of various persons as result thereof, with all of which matters the Commonwealth of Pennsylvania and the public at large are concerned."

Final Decree.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made

final, to wit: "Now, November 7, 1921, this cause came on to
89 be heard at this term, and was argued by counsel, and upon consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Fourth. The Court below erred in dismissing appellants' third exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows (page 26) :

Third Exception.

"The Court erred in its conclusion of law "Hence it is clear that the decision of the case on the facts and legal contention above stated hinges strictly upon the narrow question of whether the Legislature in the exercise of so-called "police power" and in a case where no public interest is directly concerned, can constitutionally give to a private owner of surface, the right of support against an owner of the underlying coal, thereby depriving the latter of the right to mine the same without leaving support, and thus abrogating without compensation, the very contract by which the owner of the surface acquired the same from the owner of the coal."

Said conclusion of law is erroneous in stating that no public interest is directly concerned and in stating that the contract waiving support is abrogated, whereas, it is merely modified to the extent of preventing its exercise in cases where human life would be put in jeopardy, to wit, in the present case by causing the collapse of a dwelling house used as a place of human habitation and covering only a comparatively small area of the land affected by the waiver. Said conclusion is further erroneous for the reason that it assumes that the private owner of the surface has been given the right of support, or in other words, the right to recover damages for subsidence, whereas, the Act of the Legislature has not vested the private owner with any right to recover damages not previously possessed, but has merely declared that the right of the coal owner to cause the collapse of a dwelling house or place of human habitation shall not be exercised in cases where human life or limb might reasonably be expected to be placed in jeopardy."

Final Decree.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

91

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Fifth. The Court below erred in dismissing appellants' fourth exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed are as follows (Page 26):

Fourth Exception.

"The Court erred in its decree because same violates the rights of the plaintiffs guaranteed them under Section 1 of Article XIV of the Amendments to the Constitution of the United States, which provides that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit:

"Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiff."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,

Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Sixth. The Court below erred in dismissing appellants' fifth exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed are as follows:

Fifth Exception.

"The Court erred in declaring the Act of Assembly of the State of Pennsylvania, approved May 27, 1921, and entitled "An Act regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties" known as the Kohler Act unconstitutional as applied to the facts of this case."

93

Final Decree.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921 wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,

Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Seventh. The Court below erred in dismissing appellants' sixth exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed are as follows:

Sixth Exception.

94 "The Court erred in declaring the Act of Assembly of the State of Pennsylvania, approved May 27, 1921, known as the Kohler Act aforesaid unconstitutional and violative of the provisions of Section 10 of Article 1 of the Constitution of the United States of America which provides inter alia, that "No state shall * * * pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

Final Decree.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Eighth. The Court below erred in dismissing appellants' seventh exception to its adjudication and decree nisi, which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows (page 26):

95

Seventh Exception.

"The Court erred in declaring that the Kohler Act was unconstitutional in depriving defendant company of its property without compensation and in holding that said Act was violative of the provisions of Section 1 of Article XIV of the Amendments to the Constitution of the United States."

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: 'Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.'"

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,

Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

96 Ninth. The Court below erred in dismissing appellants' eighth exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows (page 26):

Eighth Exception.

"The Court erred in holding that said Kohler Act appropriates private property to private use whereas said act merely regulates the manner of mining anthracite coal in the interest of the general welfare and public good."

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made

final, to wit: 'Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.' "

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

97 Tenth. The Court below erred in dismissing appellants' ninth exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows (page 26) :

Ninth Exception.

"The Court erred in declaring in effect that the Legislature of Pennsylvania in the interest of the public welfare and because of the necessities and conditions described in said Act cannot constitutionally pass a police regulation the effect of which might be, the protection from subsidence as a result of reckless coal mining, of plaintiffs' dwelling house and place of human habitation."

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: 'Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.' "

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

98 Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Eleventh. The Court below erred in dismissing appellants' tenth exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows (page 26):

Tenth Exception.

"The Court erred in refusing the injunction applied for in said case and in dissolving the same."

(Page 24.)

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: 'Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.'"

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,

Attorney for Plaintiffs.

99 Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page —.)

Twelfth. The Court below erred in dismissing appellants' eleventh exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows (page 26):

Eleventh Exception.

"The Court erred in concluding as a matter of law that 'The plaintiff's bill contains no averment and there is no proof on which

to base by implication or otherwise any finding of fact that any interest public or private is involved in the defendant's proposal to mine the coal except the private interest of the plaintiffs in the prevention of private injury.'"

Final Decree.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein
100 it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,

Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page —.)

Thirteenth. The Court below erred in dismissing appellant's twelfth exception to its adjudication and decree nisi which exception, final decree dismissing the same, with exception thereto, and bill sealed, are as follows (page 26):

Twelfth Exception.

"The Court erred in declaring as a matter of law that the application of the Kohler Law to the facts in the case would involve insuperable constitutional objections by impairing the obligation of a contract and by taking private property for private use without compensation."

Final Decree.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. FACE,
Attorney for Plaintiffs.

Now, December 19, 1921 the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [*sec.*]

(Page 26.)

Fourteenth. The Court below erred in dismissing appellants' thirteenth exception to its adjudication and decree nisi, which exception, final decree dismissing the same, with exception therein, and bill sealed, are as follows:

Thirteenth Exception.

"The Court erred in finding that no public interest is involved in the defendant's proposal to mine the anthracite coal underlying plaintiffs' dwelling house and place of human habitation and thereby causing the collapse and subsidence thereof."

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are denied, and the decree nisi is accordingly confirmed and made final, to wit: "Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it is ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. FACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [*sec.*]

(Page 26.)

Fifteenth. The Court below erred in declaring as a matter of law that the application of the Kohler law to the facts in this case would involve insuperable constitutional objections by impairing the obligation of a contract. This assignment contains matter included in appellants' twelfth exception to the findings of the Court below, which exception, together with the final decree dismissing same, and exception to said final decree, together with bill sealed, are as follows (Page 26):

Twelfth Exception.

"The Court erred in declaring as a matter of law that the application of the Kohler law to the facts in the case would involve insuperable constitutional objections by impairing the obligation of a contract and by taking private property for private use without compensation."

Final Decree.

Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: "Now, December 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs."

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

Sixteenth. The Court below erred in declaring as a matter of law that the application of the Kohler law to the facts in this case would involve insuperable constitutional objections by taking private property for private use without compensation. This assignment contains matter included in appellants' twelfth exception to the findings of the Court below, which exception, together with the final decree dismissing same, and exception to said final decree, together with bill sealed, are as follows:

Twelfth Exception.

"The Court erred in declaring as a matter of law that the application of the Kohler law to the facts in the case would involve
104 insuperable constitutional objections by impairing the obligation of a contract and by taking private property for private use without compensation."

(Page 24.)

Final Decree.

"Now, December 6, 1921, these exceptions having been duly heard upon the argument list as upon a rule for new trial, the same are dismissed, and the decree nisi is accordingly confirmed and made final, to wit: 'Now, November 7, 1921, this cause came on to be heard at this term, and was argued by counsel, and upon the consideration thereof by the Court it is ordered, adjudged and decreed that the bill be dismissed at the cost of the plaintiffs.'"

By THE COURT IN BANC.

(Page 26.)

Exception.

Now, December 19, 1921, the plaintiffs respectfully except to the order and decree of the Court of December 6, 1921, wherein it was ordered, adjudged and decreed that the bill be dismissed at the costs of the plaintiffs.

W. L. PACE,
Attorney for Plaintiffs.

Now, December 19, 1921, the filing of the foregoing exception is noted and granted and bill sealed, and directed to be filed.

HENRY A. FULLER. [SEAL.]

(Page 26.)

H. J. MAHON,
W. L. PACE,
Counsel for Appellants.

Endorsement: In the Supreme Court of Pennsylvania, Eastern District. No. 290. January Term, 1922. H. J. Mahon and Margaret Craig Mahon, his wife, Appellants, vs. Pennsylvania Coal Company, Appellee. Assignments of Error. Filed in Supreme Court Apr. 10, 1922, Philadelphia. W. L. Pace and H. J. Mahon, for Appellants.

105 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922.

No. 290.

W. J. MAHON and MARGARET CRAIG MAHON, Appellants,

vs.

PENNSYLVANIA COAL COMPANY.

Petition to Intervene.

To the Honorable the Chief Justice and Justices of the Supreme Court of Pennsylvania:

The petition of the City of Scranton respectfully represents:

1. The above captioned cause now pending in your Honorable Court is an appeal by the plaintiffs from a decree dismissing their bill in equity, which decree was entered by the Court of Common Pleas of Luzerne County to No. 11 October Term 1921, in equity.

2. The appellants therein are citizens of the county of Luzerne and owners of land therein. The defendant below and appellee in this Court is Pennsylvania Coal Company, a corporation engaged in operating a mine or mines in Luzerne County, Pennsylvania.

3. The bill was filed in the Court below under the authority of the Act of May 27, 1921, P. L. 1198, entitled "An Act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties." The Court below dismissed the Bill upon the ground that the said Act was unconstitutional and that therefore plaintiffs could not avail themselves of its provisions.
106 nor obtain relief under it.

4. In the Court below your petitioner, the City of Scranton, was permitted to file a brief in support of the bill by reason of its great interest in the matter in controversy and in the sustaining of the constitutionality of said Act of Assembly.

5. Your petitioner, the City of Scranton, is a city of the second class, duly organized and existing under the laws of this Commonwealth. A large portion of said city overlies one or more veins of anthracite coal and the reckless mining of said coal in certain congested areas of said city, particularly the so-called robbing of pillars has resulted in all of the evils complained of in the preamble to said Act of Assembly.

6. Your petitioner was, amongst other municipalities and persons, natural and artificial, largely instrumental in procuring the passage of the Legislature of the said Act of May 27, 1921, as well as another Act of the same date, P. L. 1192, entitled, "An Act affecting anthracite coal mines and operations; establishing the Pennsylvania

vania State Anthracite Mine Cave Commission; defining its jurisdiction and powers; imposing duties upon owners and operators of anthracite coal mines; and imposing penalties"; the said two Acts constituting together highly important remedial and preventive legislation for the protection of the public health and safety throughout those portions of the Commonwealth wherein anthracite coal is mined.

7. While the proceeding in question was brought in Luzerne County, the fact is that the county of Lackawanna and the citizens of that county, and more particularly of the city of Scranton, are more seriously affected at the present time by the conditions which said legislation was aimed to correct than the citizens of any other district or municipal division of the Commonwealth. Petitioner avers that millions of dollars of property and thousands of human lives may be affected by the decision in this appeal and that it is of great importance not only to your petitioner, but to the citizens and property holders of the district within which this petitioner is by law authorized to perform its activities, that your Honorable Court should have the fullest presentation of the questions involved upon the hearing of this appeal.

Wherefore your petitioner respectfully prays that it be allowed to intervene in this appeal on the part of the appellants therein, upon such terms as your Honorable Court shall deem fit, and that it be allowed to file its paper book in support of said appeal and in support of the constitutionality of the said Act of Assembly at the argument thereof.

And your petitioner will ever pray, etc.

CITY OF SCRANTON,
By JOHN DURKAN,
Mayor.

COMMONWEALTH OF PENNSYLVANIA,
County of Lackawanna, ss:

John F. Durkan, having been duly sworn according to law, doth depose and say that he is Mayor of the City of Scranton, the petitioner above named, and makes this affidavit on behalf of said petitioner, and that the matters of fact set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOHN DURKAN.

Sworn to and subscribed before me this 2d day of March A. D. 1922.

{SEAL.]

PHILIP V. MATTES,
Notary Public.

My commission expires Mch. 28, 1923.

Endorsement: In the Supreme Court of Pennsylvania, Eastern District. No. 290. January Term, 1922. W. J. Mahon and
 108 Margaret Craig Mahon, Appellants, vs. Pennsylvania Coal Company. Petition of the City of Scranton to Intervene. March 20, 1922. Prayer granted to this extent only: Petitioner may file paper book and participate by counsel at oral argument, R. v. M., C. J. Filed in Supreme Court Mar. 10, 1922. Philadelphia. Philip V. Mattes, City Solicitor.

109 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922.

No. 290.

H. J. MAHON and MARGARET CRAIG MAHON, His Wife, Appellants,
 vs.

THE PENNSYLVANIA COAL COMPANY, Appellee.

Appeal from the Decree of the Court of Common Pleas of Luzerne County, of October Term, 1921.

No. 11. In Equity.

Petition of the Attorney General for Leave to File a Brief Amicus Curiae and to Participate in the Argument upon Appeal.

To the Honorable Robert von Moschzisker, Chief Justice, and the Associate Justices of the Supreme Court of Pennsylvania:

The petition of George E. Alter, Attorney General of the Commonwealth of Pennsylvania, respectfully represents:

That the above entitled appeal raises the question of the constitutionality of the Act of Assembly approved May 27, 1921, P. L. 1198, popularly known as the "Mine Cave Law."

That the said Act of Assembly was a remedial measure passed by the Legislature and approved by the Governor for the purpose of correcting evils which threatened the life, health and safety of persons living and working in the anthracite coal regions of Pennsylvania.

That the said Act of Assembly is attacked upon the ground that it is not a valid exercise of the police power of the Commonwealth, and

That the Commonwealth of Pennsylvania is greatly interested in the decision which your Honorable Court may reach after
 110 hearing the said appeal.

Wherefore, your petitioner, the Attorney General, respectfully prays your Honorable Court that on behalf of the Commonwealth of Pennsylvania he may be permitted to file a brief amicus

curiæ and to participate in the argument of the case when the same may be heard.

GEORGE E. ALTER,
Attorney General of the Commonwealth of Pennsylvania.

Endorsement: In the Supreme Court of Pennsylvania, Eastern District.—No. 290, January Term, 1922.—H. J. Mahon and Margaret Craig Mahon, his wife, Appellants, vs. The Pennsylvania Coal Company, Appellee.—Petition of the Attorney General for leave to file a brief amicus curiæ and to participate in the argument upon appeal.—March 30, 1922, prayer granted to this extent only: petitioner may file paper book and participate by counsel at oral argument. R. von M., C. J.—Filed in Supreme Court Mar. 30, 1922. Philadelphia.—Fred Taylor Pusey, Deputy Atty. General. George E. Alter, Attorney General.

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In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922.

No. 290.

H. J. MAHON et al., Appellants,

v.

PENNSYLVANIA COAL COMPANY.

Appeal from the Order of the Court of Common Pleas of Luzerne County.

Opinion.

Moschzisker, C. J.:

This is an appeal from a decree dismissing a bill in equity. Plaintiffs, man and wife, asked that defendant, a Pennsylvania corporation, be restrained from mining any coal underlying the former's property in the City of Pittston, "the removal of which will cause the caving-in, collapse or subsidence of their dwelling house," contrary to the Act of May 27, 1921, P. L. 1198, commonly known as the Kohler Act.

At the outset, it may be stated that, so far as the contractual rights of the respective parties are concerned, as shown by the paper title to the properties involved, defendant is expressly authorized to mine the subjacent strata owned by it without any obligation to support the surface owned by plaintiffs.

The court below found that, "if not restrained, defendant * * * will * * * cause the caving-in, collapse and subsidence of the surface, together with the dwelling, entailing injury upon plaintiffs," but refused an injunction, on the ground that "the owner of

the coal has an absolute right to remove the whole of the same, free from all liability for injury thereby inflicted," and "no interest is involved * * * except the private interests of the plaintiffs in the prevention of a private injury."

The position assumed by the learned court below raises, as the sole question for consideration, the applicability of the Kohler Act to the facts of this particular case; but the discussion of counsel, representing the parties to the cause and those who were allowed

112 to intervene at argument, including the city solicitor and the attorney general of the state, has taken a much wider range, and calls for consideration, first of all, of the constitutionality of the act itself, as a reasonable and valid exercise of the police power.

The statute is entitled: "An act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties." This title is sufficient to cover the contents of the enactment.

Section 1 provides that it shall be unlawful "so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of (a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations; (b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public; (c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law; (d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed; (e) Any cemetery or public burial ground."

Sections 2 to 5, inclusive, place certain duties on public officials and persons in charge of mining operations, to facilitate the accomplishment of the purposes of the act.

Section 6 provides the act "shall not apply to [mines in] townships of the second class [i. e., townships having a population of less than 300 persons to a square mile], nor to any area wherein the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person."

Section 7 sets forth penalties; and section 8 reads: "The courts of common pleas shall have power to award injunctions to restrain violations of this act."

113 The remaining sections state: when the statute takes effect; that inconsistent legislation is repealed; that "This act is intended as remedial legislation, designed to cure existing evils and abuses, and each and every provision is intended to receive a liberal construction such as will best effectuate that purpose;" and that all provisions "are severable one from another."

In determining whether the act is a reasonable piece of legislation within the police power, we may "call to our aid all those ex-

ternal or historical facts which are necessary for this purpose and which led to the enactment." Endlich, *Interp. of Stats.*, s. 29.

The anthracite coal field of Pennsylvania comprises a large area, on the surface of which have grown up, and now exist, many cities, boroughs and villages, containing a population of approximately a million persons. When this district was sparsely peopled, the caving-in of the surface was not of public moment; but, within the past fifteen or twenty years, it has become a matter of wide-spread notoriety that these disturbances menace the safety and material welfare of the inhabitants of communities in that part of the state. During the period mentioned, the facts have been put before the public, not only by news of the collapse of streets and the fall of buildings, but also through the reports of commissions created by joint resolutions of the legislature and by means of numerous proposed statutes, antedating the present law, introduced into that body, some of which passed and others did not; likewise, by messages from the Governor of the Commonwealth addressed to the General Assembly.

The conditions that gave rise to the act are summarized in a preamble thus: "Whereas, the anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such a manner as to remove the entire support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, streets, and private dwellings, broken gas, water and sewer systems, the loss of human life, and in general so as to
114 threaten and seriously endanger the lives and safety of large numbers of the people of the Commonwealth; therefore be it enacted" etc.

In signing the bill, the governor stated of record that "lives have been lost, homes, churches and schools destroyed, and an ever-present peril has threatened the morale of the entire community;" adding, "for a generation the appeal * * * to save the situation has been heard at the capital."

It is not denied on the present record that the conditions above described exist; and the legislature having declared in terms what, in a general way, had become a matter of public notoriety, we must accept such declaration as a correct statement of facts: *People ex rel. Durham Realty Corp. v. La Fetra*, 230 N. Y. 429, 440; *Lower Vein Coal Co. v. Industrial Bd.*, 255 U. S. 144, 148; *Block v. Hirsh*, 258 U. S. 135, 154; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 198.

That the conditions portrayed in the legislative declaration are such as to create an emergency, properly warranting the exercise of the police power, is sufficiently obvious not to call for extended discussion. It is primarily for the legislature to consider and decide on the fact of a danger, then meet it by a proper remedy; *Stafford v. Wallace*, 42 Supreme Ct. Rep. (issue of June 9, 1922), 397, 401.

Of course, the cure must always bear a substantial relation to the existing evil, and must not constitute a mere attack on property rights, disguised as an exercise of the police power. In judging as to this, however, it is to be remembered that "in order to serve the

public welfare, the state, under its police power, may lawfully impose such restrictions upon private rights as, in the wisdom of the legislature, may be deemed expedient; for all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community * * * [and] a statute enacted for the protection of public health, safety or morals can be set aside by the courts only when it plainly has no real or substantial

relation to these subjects or is a palpable invasion of rights
 115 secured by the fundamental law; if it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination is conclusive." *Nolan v. Jones*, 263 Pa. 124, 127-8, and authorities there cited.

It has often been decided of recent years that the mere fact of an exercise of the police power interfering with the use of property will not render such exercise unconstitutional. A host of authorities on this point might be cited, but it is not necessary to go beyond our own recent cases. In *Nolan v. Jones*, supra, at page 131, discussing another case (*Com. v. Charity Hospital*, 198 Pa. 270, 277) that dealt with an act which prevented a hospital from erecting additional buildings on real estate owned by it, we said that such deprivation was not a violation of the fourteenth amendment, and did not take from the complainant its property without due process of law, adding, "It is true the act does prevent the [hospital] from using its property in a manner which before was lawful, but [since] * * * the act in question is * * * a valid police regulation * * * defendant has no cause of complaint." This last mentioned principle applies here, for the statute before us is a police measure which does not, in any true legal sense, contemplate the taking of private property for public use (*Com. v. Plymouth Coal Co.*, 232 Pa. 141, 149), or the transferring of it from one person to another: *Jackson v. Rosenbaum Co.*, 263 Pa. 158, 167-70, and authorities there cited. In fact, the prayers of the present bill suggest no such intention: they are, first, as quoted at the head of this opinion; second, that defendant be restrained from "so conducting its mining operations as to cause the caving-in, collapse or subsidence of plaintiff's dwelling;" and, third, for general relief—in other words, for such incidental interference with defendant's property rights, and such only, as may be necessary in order to carry out the declared public policy of the state.

Incidental interference with property rights, by legislation
 116 regulating the mining of coal, is by no means new to Pennsylvania; such interferences have invariably been upheld as proper exercises of the police power: see *Commonwealth v. Plymouth Coal Co.*, 232 Pa. 141, and cases there cited, affirmed by the Federal Supreme Court in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531.

True, in *Commonwealth v. Clearfield Coal Co.*, 256 Pa. 328, 330-1. we ruled, on the law as it then stood, that a defendant, possessed of the contractual right to let down the surface, would not be "re-

strained from mining coal under a school building, to the injury thereof," at the suit of one who held title to the surface subject to that right, saying, *inter alia*, "it is difficult to understand how the doing of a lawful act in a lawful manner can constitute such a public nuisance as will be restrained in equity;" but "circumstances may so change in time * * * as to clothe with [a public] interest what at other times * * * would be a matter of purely private concern" (*Block v. Hirsh*, 256 U. S. 135, 155), and since the date of the *Clearfield* decision, the *Kohler Act* has been passed, declaring, in effect, mining such as threatened by the present defendant to be a public nuisance.

It always has been the law of Pennsylvania that the surface owner was entitled to support unless he released or waived his right, but when he did so, he would be held to his contract; the law, as thus developed, was pronounced and acted upon in the *Clearfield Case*. After that pronouncement, however, the General Assembly—taking cognizance of the change in conditions wrought by time and new methods of mining, and of the increasing public harm worked by the rule theretofore adhered to,—altered the law in so far as it applied to certain presumably thickly populated areas in the hard-coal district, forbidding such mining operations as would cause the letting down of the surface under, *inter alia*, "any dwelling or other structure used as a human habitation," and providing for restraint by injunction. Thus the law in the *Clearfield Case*, so far as it might apply to the facts at bar, is effectively overruled by those who have the right to declare the public policy of the State; and this legislative pronouncement, as also the means provided to carry it into effect, is binding on us, unless a palpable abuse of power appears, or unless it can be demonstrated that the statutory relief thus provided is plainly forbidden by the organic law.

We said, in *Pennsylvania R. R. Co. v. Ewing*, 241 Pa. 581, 589, "The scope of judicial inquiry in deciding questions of power is not to be confused with the scope of legislative considerations in dealing with matters of policy; whether an enactment is wise or not, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance," citing *Chicago, etc., R. R. Co. v. McGuire*, 219 U. S. 549.

The Federal Supreme Court, dealing with the general subject in hand, said in *Lawton v. Steele*, 152 U. S. 133, 140: "While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in this regard, and, if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed;" see also *Shelby v. Cleveland Power Co.*, 155 N. C. 206, 201; *Village of Atwood v. Otter*, 296 Ill. 70, 81, 129 N. E. 573,

In view of the facts which gave rise to the act now before us, we cannot say the questions involved were not for legislative decision; nor can it be held, under the authorities, that the contractual right of defendant to let down the surface is rendered dominant by the various constitutional provisions depended on by appellee Bowman v. Chicago Ry. Co., 125 U. S. 465, 517; Chicago, etc. R. R. Co. v. McGuire, 219 U. S. 549, 569; McLean v. Arkansas, 211 U. S. 539, 547; Atlantic C. L. R. R. Co. v. Goldsboro, 232 U. S. 548, 558; Levy Leasing Co. v. Siegel, 42 Supreme Ct. Rep., Issue of Apr. 15, 118 1922, p. 289, 292, and cases there cited); particularly is this so when we consider the mandate of our constitution (art. XVI, sec. 3) that "the exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the * * * general well-being of the state." Scranton v. P. S. Com., 268 Pa. 192, 195.

The police power, "legitimately exercised, can never be limited by contract nor bartered away by the legislature" (Holden v. Hardy, 169 U. S. 386, 392; see also N. Pacific Ry. Co. v. Minn., 208 U. S. 583, 596, 597); and this court, in dealing with the police power has repeatedly held that private contracts cannot interfere with its legitimate exercise by the state; the theory being that all contracts raising rights or imposing obligations, the exercise of which may affect the public welfare, are, of necessity, made subject to the reserved right of the state to modify them by legitimate assertions of the police power: Leiper v. B. & P. R. R. Co., 262 Pa. 328, 332; Scranton v. P. S. Com. 268 Pa. 192, 197-8.

It was the harmful results, to the community as a whole, of contracts granting the right to let down the surface under any and all circumstances, that gave rise to the statute now attacked; and the power to enforce the public policy of the state, declared in this legislation, cannot be defeated because they who move the court (plaintiffs at bar) are parties to such a contract.

The legal right of these individual plaintiffs to proceed in equity is not questioned in the pleadings, and no one, directly or indirectly involved in the present suit, raises any point against such right; but, since it is a matter of public importance, the court itself asked that printed arguments be submitted thereon. After reading the various briefs prepared by learned counsel, we are convinced there is nothing in the law to prevent plaintiffs from prosecuting these proceedings; as we shall now show.

First, since the statute itself contains a provision for its enforcement by injunction, the fact that violations thereof constitute a misdemeanor, is of no moment. Next, we have already held, supra, that the fact of plaintiff's contract, granting defendant a right to let down the surface of the land in question, cannot interfere with the enforcement of the declared public policy of the state; hence appellants' peculiar special interest—affected, as it is, by a waiver of surface support which antedates the legislative declaration of public policy,—constitutes no bar against their coming within the general rule that persons with a special interest may

have public nuisances abated at their own suit; as to the right of persons with a special interest to such relief, see *Klein v. Livingston Club*, 177 Pa. 224, and cases there cited; and, for relevant authorities from other jurisdictions, see *Kaufman v. Stein*, 138 Ind. 49; *People's Gas Co. v. Tyner*, 131 Ind 277; *Cranford v. Tyrrell*, 128 N. Y. 341; *Joos v. Illinois Nat. Guard*, 257 Ill., 138; also statement of general rule in 20 R. C. L. 476, s 90. It is not necessary to depend upon plaintiffs' special interest, however, for, under the Kohler Act, they may be viewed as moving the court to enforce a general rule of public policy, intended for the protection of the whole community, rather than as acting simply for their own protection. As said in *Com. v. Plymouth Coal Co.*, 232 Pa. 141, 146, quoting from and citing other authorities: "The whole is no greater than the sum of all its parts, and when individual * * * safety and welfare are sacrificed, the State must suffer." Every habitation thrown to the ground in the course of the operations of a vast industry,—the manner of conducting which has caused many such occurrences,—with the dangers to human life and other direful possibilities that attend these happenings, can well be considered as part of a general harm, against which the legislature, exercising the police power of the state, may properly provide. Finally, the authorities indicate that it is competent for the legislature to vest a civil remedy to enforce a declaration of public policy in any citizen, irrespective of his special interest, and this the present act does in effect. The principle involved is thus stated in *Littleton v. Fritz*, 65 Iowa 488, 496; "There can be no doubt it is within the power of the legislature to designate the person or class of persons who may maintain actions to restrain a public nuisance, and when that is done, the action is, for all purposes, an action instituted in behalf of the public, the same as though brought by the attorney general or public prosecutor." In this connection, our own case of *Craig v. Klein*, 65 Pa. 399, 410, 412, shows the state may authorize its citizens, individually, to assist in the enforcement of police regulations, albeit no property interest of the particular plaintiff has been specially affected by the violation complained of. Though plaintiffs' right to maintain the present suit cannot be opposed successfully, yet the act itself is attacked on other grounds, which call for determination.

Appellee stigmatizes the act as local and special legislation, forbidden by the constitution. The facts that the statute is inapplicable to bituminous coal mines, to operations located in townships having a population of less than 300 to the square mile, and to "any area wherein the surface overlying the * * * operation is wild or unseated land," or "where such surface is owned by the owner or operator of underlying coal and is distant more than 150 feet from any improved property belonging to any other person," do not, on the grounds of local or special legislation, constitute it a violation of the organic law of Pennsylvania; proper classification is permissible, and the act before us is in that category.

Laws enacted in pursuance of a necessity that springs from manifest peculiarities, distinguishing the persons, objects or localities regulated for, from other classes as to which the legislation in

question would be useless and detrimental, are, properly speaking, neither local nor special,—they are general, because governing all persons, objects or localities similarly situated (*Ayers's Appeal*, 122 Pa. 266, 281; *Com. v. Gilligan*, 195 Pa. 504, 510); such grouping is permissible and cannot be set aside by the courts.

"Classification is a legislative question, subject to judicial revision only as far as to see that it is founded on real distinctions in the subjects classified;" *Seabolt v. Commissioners*, 187 Pa. 318, 323. Here the distinctions are real and fully warrant the classifications in hand.

To begin with, the fact that the present act distinguishes coal mining from other sorts of mining cannot prevail against the validity of the statute in the absence of some warrant for holding the resulting classification to be without reason; for, nothing appearing to the contrary, it is "assumed the legislature proceeded after full examination" and made the distinction on proper grounds: *Nolan v. Jones*, 263 Pa. 124, 128, and cases there cited. Next, the distinction between mining operations in the anthracite and in the bituminous coal fields has been constantly and consistently recognized in our law, both by the courts and the legislature, for many years, and is now well established: see Act March 3, 1870, P. L. 3, construed in *Williams v. Bonnell*, 8 Phila. 534; Act June 2, 1891, P. L. 176, construed in *Durkin v. Kingston Coal Co.*, 171 Pa. 193; Act May 15, 1893, P. L. 52, construed in *Com. v. Jones*, 4 Pa. Superior Ct. 362; see also *Com. v. Grossman*, 248 Pa. 11, 18; *Com. v. Alden Coal Co.*, 251 Pa. 134, 139. Lastly, the other distinctions before mentioned, are all founded on differences arising from the fact of density, or lack of density, of population; and such circumstances have repeatedly been considered as constituting a sound basis of classification.

In connection with the statement just made,—that conditions of population form a proper ground of classification,—see, for example, *Com. v. Charity Hospital*, 198 Pa. 270, 276-7, 283, where an act prohibiting the "establishing or maintaining of additional hospitals, pest houses or burial grounds, in built up portions of cities," was attacked as local or special legislation. In sustaining the act, the court below said: There is obviously much greater danger to the general public health from [hospitals, etc.] in a populous city than in the country, or in a village, and the danger will be in proportion to the number and density of the population " * * *"; and, therefore, a statute prohibits hospitals, etc., in the built up portions of cities it thereby draws a line, having the populous centers on one side and the less populous on the other, in a case where the supposed evil does or does not exist, according to the greater or less density of population." We adopted this reasoning, *per curiam*. The Anthracite Mining Act of June 2, 1891, P. L. 176, applies solely to mines of that character, located in certain parts of designated counties, employing a working force of "not more than ten persons"; it was sustained in *Durkin v. Kingston Coal Co.*, 171 Pa. 193, 204. Again, party wall legislation is applicable to "congested districts" alone: *Jackson v. Rosenbaum*, 263 Pa. 13

72. On the general subject of classification according to population, *Wheeler v. Phila.* 77 Pa. 338, and *Beltz v. Pitsburgh*, 36 Pa. Superior Ct. 66, may be cited.

The act before us expressly recognizes the evident fact that conditions attending upon mining operations in densely populated communities differ greatly from, and, so far as surface support goes, are more dangerous than those in sparsely settled or uninhabited districts; this difference warrants the classification here involved: *Am. v. Handley*, 15 Pa. Superior Ct. 271; *Beltz v. Pitsburgh*, 36 Pa. Superior Ct. 66. Had the distinction based upon density of population not been adopted, and had the legislation been made to apply to mines in sparsely settled townships, then, since every corner of the police power must be reasonable, appellate judges, perhaps, have argued with some force that it was useless and detrimental to carry out the provisions of the statute in localities where both common sense and common consent would declare no necessity or danger existed; thus the argument against the classification adopted seems to defend itself.

In *Russ Street*, 132 Pa. 257, 274, this court said: "having the many subjects of legislation which classification presents [see] . . . the preservation of the public health, protection against fire," etc.; and to this statement, of course, may be added, "the preservation of the public safety." The whole structure of the present act manifestly rests on this basis, and its justification is sanctioned by the previously quoted preamble.

While on the subject of the preamble, it may be well to note that, although this part of the bill does not appear at the head of the statute in the published volume of laws for the year in question, the legislative records show it was passed and then printed in the printing of the law, under the act of June 3, 1901, P. L. 664, which, very unwisely, we think, directs that "No preamble . . . shall be printed when such bill becomes a law and is printed for general use."

The objection that sections 4 and 5 of the act offend against the provision of our constitution which forbids local or special legislation "prescribing the powers and duties of officers in cities, boroughs and townships," need not be considered, since no question arising hereunder is properly before us.

Towards 200 authorities have been submitted for our consideration. We have studied all with which we were not already familiar, and cited a number, some with discussion; others, omitted, may be as appropriate as those mentioned, but a proper regard for the length of this opinion forbids their use. Of course, many of the authorities noted comprehend rulings on a state of facts essentially different from those now before us; but, in such instances, the opinion will be found to contain either illustrative discussions or statements of appropriate general principles, and the cases are used for that reason, not necessarily in approval of rulings they may happen to include. Finally, we need not discuss further the authorities decided on by appellate; it is sufficient to say that none of them control the present case.

The order appealed from is reversed and the bill reinstated; the record is remitted, and the court below is directed to enter a decree in accord with the views expressed in this opinion; appellee to pay the costs.

Dissenting opinion by Kephart, J.

124 Endorsement: [234.] In the Supreme Court of Pennsylvania, Eastern District.—No. 290, January Term, 1922.—H. J. Mahon et ux., Appellants, v. Pennsylvania Coal Company.—Appeal from Order of the Court of Common Pleas of Luzerne Co.—Argued April 17, 1922.—Order reversed and bill reinstated; record remitted and court below directed to enter a decree in accord with views expressed in this opinion; appellee to pay costs. Moschzisker, C. J.—Filed in Supreme Court Jun. 24, 1922. Philadelphia.—Dissenting Opinion by Kephart, J.

125 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1922.

No. 290.

H. J. MAHON and MARGARET CRAIG MAHON, Appellants,
v.

PENNSYLVANIA COAL COMPANY.

Appeal from Decree of Court of Common Pleas of Luzerne County.

Dissenting Opinion.

KEPHART, J.:

While there are many cases of property damage due to subsidences, and people located thereabouts have been permitted to suffer because of what was then, and is now declared to be, a mistaken idea as to the power of an individual to sell property without surface support, yet that was the Commonwealth's blunder, and the Commonwealth should pay for its mistakes from general funds or use for this purpose the money now to be received from taxes on this very coal. No great hardship would follow that action; this, indeed, was the solution of this problem reached by the Constitutional Revision Commission of 1920; an amendment was proposed which, in express words, permitted the legislature to tax only for the purpose of affording compensation to surface owners. Instead of adopting such remedy, the legislature passes two bills known as the Kohler and the Fowler Bills, only the first of which is here for consideration. But, in this case, we cause the party, who has paid, to pay again, and still another time when some legislature thinks an additional charge advisable.

The majority opinion is a long stride in the development of the law of police power. It broadens its hitherto known scope, makes

126 it applicable to subjects never contemplated by the framers of the constitution, subordinates all other constitutional guarantees in apparent conflict, and the exercise of this power becomes nothing more than the will of the legislature, without being subject to judicial investigation. This may be a proper conception of the science of government, but I do not think the constitution of this state or of the United States would have been adopted had the participants expected such results. The logical result of the majority opinion will go far to bring about the desideratum so fervently longed for by those advocating equalization of property. Constitutional mandates and protections are thus swept aside and the legislature is supreme, while acting within any pretended scope of this power, so long as the statute, in a preamble, asserts: "this is for the public good." Police power becomes the open door to govern or rule, for, through it, property may be transferred from one person to another without compensation; this limitation of power to so act was heretofore one of the chief obstacles in the way of those favoring this socialistic principle.

It will thus be seen how vital this litigation is, not only with respect to the particular subject-matter involved, but also as to all other holdings; it is impressively far reaching, as it legalizes that which may yet come to pass. It is a short step from coal, thus transferred to others, to money, lands and buildings. The legislation on which this suit is grounded covers property rights estimated not in tens but hundreds of millions of dollars, and reaches a commodity absolutely essential to our preservation. The lives of the people are dependent on an adequate supply of coal. If the majority view is to be sustained, and its opinion given its logical place, the law not only adversely affects the procurement of this commodity, but might ultimately deprive many people of its use.

127 Since *Jones v. Wagner*, 66 Pa. 429, 435, decided in 1870, followed by *Scranton v. Phillips*, 94 Pa. 15, 22, and a long line of cases thereafter, this court has recognized the absolute right to acquire, possess and protect property, including the right to make a reasonable contract in relation thereto; the right to create different estates in land, selling the sub-stratum, releasing the right to have the superincumbent estates supported or releasing the right of surface support; the right to mine all the minerals, even though it should result in the surface falling in. This court has said such contracts are non contra bonos mores, or prejudicial to general welfare and public policy, that they should be recognized, and that all persons competent to contract should have the utmost liberty to do so. Based on these opinions (*Adinolfi v. Hazlett*, 242 Pa. 25, 27; *Waters v. Wolf*, 162 Pa. 153, 170; *Godcharles v. Wigeman*, 113 Pa. 431, 437; *Graff Furnace Co. v. Scranton Coal Co.*, 244 Pa. 592, 596), constantly reaffirmed within the last fifty years, we have not only placed the seal of approval on such contracts, but have written our decisions into them.

In *Com. ex. rel. v. Clearview Coal Co.*, 256 Pa. 328, under similar facts, this court refused to enjoin a failure to support a public school building or removal of coal thereunder. We there held that to grant

the relief asked "practically takes such coal (as was necessary to support the surface) from defendant and vests it in the School District," which "would, in fact, be a taking of private property for public use without compensation, which the constitution forbids." Further, in *Penman v. Jones*, 256 Pa. 416, recently affirmed in *Charnetski v. Coal Co.*, 270 Pa. 459, we have recognized in this state three distinct estates in mining properties: (1) the surface, (2) the underlying coal, and (3) the so-called third estate, or right to have the surface supported by the underlying strata. This latter estate may be in the surface owner, giving full right of support, or in the coal owner, giving absolute power to mine without interference, or a third condition, not material for our present consideration. In the case at bar, this third estate had vested, by virtue of a valid contract between the owner of the surface and the owner of the coal, in the latter. The Kohler Act takes this property right from defendant

and vests it in plaintiff without compensation. This act does
 128 more than merely restrict defendant in the use of property; it transfers an independent property right to plaintiffs, vesting the permanent use and perpetual enjoyment of this right in one who is not required to pay anything for what he so acquires.

We have thus, by the foregoing decisions, encouraged our citizens, and others throughout the nation, to invest millions in these enterprises, until we have here developed the great anthracite industry, peculiar to Pennsylvania, and to but few counties in the state. The legislature stood by during all this time, watched the growth of this enterprise, noted the subsidences, and did nothing. When this great anthracite industry reached its most flourishing state of prosperity, the state, for reasons hereinafter stated, comes along with an act that nullifies the contracts under which a great extent of territory was procured; contracts solemnly made on the faith of the word of the highest court of this state are swept aside, rights summarily swept aside, and property is transferred to individuals without compensation.

Plaintiffs' predecessor in title, or, for the purposes of this case, these plaintiffs, together with the many others who purchased similar surface lots in the anthracite region, paid much less for the property purchased because they were willing to acquire it without the right of support, even though the surface fell in. Still others sold the coal beneath their lots, giving the grantee the full right to mine it without any duty to support the surface, securing a better price for their bargain than if they had retained support. The first class could have stipulated for support, and the second could have retained it, and the coal owner would have been required to leave standing in pillars from one-fourth to one-third of the coal; but they did not see fit to do so. It now happens they, and others like them, are dissatisfied and have induced the legislature to pass this act, known as the Kohler Act, which forbids mining this same coal from under this

same lot without leaving sufficient surface support, that is
 129 requiring, for all practical purposes, from one-fourth to one-third of the coal to remain in place. The act gives free of charge to all these surface owners that which they have already been

paid for; all this, under the police power. But, mark the deception of those who wrote the act. At the same session of the legislature, that body, by another act, permits the same coal owner to take out the same coal, provided he pays a certain percentage of the market tonnage price of the coal to a state coal commission; this to be used to reimburse these same plaintiffs for the same rights already paid for. The majority opinion does not discuss the second act, known as the Fowler Act: May 27, 1921, P. L. 1192.

Under the latter act, this commission collects two per cent of the market price of coal mined during the year. During the years 1920 and 1921 ninety million tons of anthracite coal were mined each year, of a market price of approximately \$6 a ton, netting the commission and the surface property holders from ten to eleven million dollars per annum, when the acts are in operation. This defendant, who is now enjoined, can go to that commission, under the Fowler Act, pay two per cent on all his tonnage, and procure the privilege of mining this same coal.

Both acts comprehend all coal companies engaged in the anthracite business; while second class townships are eliminated from the Kohler Act, they are very few, the majority being first class; but as the majority of coal operations center in some place covered by the act, practically all hard coal operators are included. The price paid is two per cent on all tonnage, no matter where mined or how long the mining continues; he pays, as long as mining continues, on all tonnage for the privilege of taking out coal under any single habitation. Payment to the commission is not restricted to coal taken from under that lot or building, nor does it matter how deep the coal or how unlikely subsidence would affect the surface. The Kohler act clearly impairs the obligation of contract, inhibited by section 10 of article 1 of the federal constitution, and section 17 of article 1 of our constitution. See *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 671, 672; *Russell v. Sebastian*, 233 U. S. 195, 204.

The police power, in the Kohler Act, is supposed to come from protection to life, property and safety; but, under this act, these terms are meaningless. If the legislature had desired to protect life and limb it could have required a notice, given sufficient time in advance, from the operator to the surface owner, when mining was to be done under his or her land, where the right of surface support had been released or conveyed away. Severe penalties could be attached for failure to give the notice in time if mining was proceeded with. It will thus be seen that, regardless of anything else that may be in the act with respect to these purposes, the end does not justify the means, and it is evident, from both acts, the real purpose of the legislature and the framers of the act was in the interest of property, and property alone,—not to prevent the “terrible menace to human life, public safety and morals.”

Nor can we conceive this a proper exercise of police power. The recent cases, recently decided by the United States Supreme Court, do not support the Kohler Act. If the laws there sustained had been

effective for all time to come, and if, instead of providing expressly for fair compensation, had denied all compensation, I feel sure the Supreme Court would have held them unconstitutional, even though emergency laws, passed to meet an overpowering necessity. My view of the rent cases is that the war brought on a crisis, presenting a condition wherein landlords generally, through excessive charges, so disturbed the peace and security of the people that states were compelled to regulate the business by limiting them to a fair return. There was no thought or attempt to take landlords' property, or their use of it, without just compensation. Such laws were to continue only so long as the crisis brought on by the war existed.

131 This failure to provide compensation, in the Kohler Act, brands it as unconstitutional.

The recent decisions by the United States Supreme Court in the Child Labor cases are more applicable; they indicate the duty of the courts to curb attempts by the legislative branch to assume to itself powers denied it by the constitution, notwithstanding the effort to cover the true nature of the power exercised by a preamble or other provision ostensibly bringing it under another recognized power.

The legislative declaration that a given use is a public one does not conclusively determine the question; it is for the courts to decide whether or not a statute is a legal exercise of the police power. They are not bound by the form of the act, but will look into the substance of things: *Nolan v. Jones*, 263 Pa. 124, 128; *Dobbins v. Los Angeles*, 195 U. S. 223, 236; *Mutual Film Corp. v. Industrial Commission of Ohio*, 236 U. S. 230; *Chi. Mil. & St. P. R. R. Co. v. Wisconsin*, 238 U. S. 491, 500. Here are plaintiffs asserting, for their own benefit as a public use, an act which, in its application, is purely personal to them. The Barrier Pillar Case (*Com. v. Plymouth Coal Co.*, 232 Pa. 141; 232 U. S. 531) is, to my mind, clearly distinguishable. The requirement that the adjoining mine owners leave pillars along their respective boundaries had an obvious and necessary relation to the life and safety of their employees, which could be safeguarded in no more reasonable way. It did not constitute a permanent deprivation of property or transfer its use permanently to another, the restriction imposed being but temporary or incidental. Furthermore, each owner there received a reciprocal benefit, commensurate with the burden imposed, in the protection of his own mine from water in that adjoining. One party was not, as in the case of the Kohler Act, made to suffer all the burden for the benefit of another.

We have already observed these acts show on their face their intention was not to protect lives or safety generally, but merely

132 to augment property rights of the few; the public generally, as distinguished from this particular class, is not interested, but they are vitally interested in the continued production of this commodity, which is here unduly interfered with, to their prejudice. So we have, by the majority opinion, the police power overriding the constitutional provision as to (a) the obligation of contracts, (b) the taking of property without compensation. The attempt of the legis-

lature, in passing these two acts,—the one an effort to exercise presumptively a valid police power, and the other sweeping aside whatever good intent was in the first,—was a mere subterfuge to create the Kohler law a valid act under this power.

We have held defendant's right to the subjacent mineral was as absolute as it was possible to make it, such strata being expressly relieved from the duty of supporting the surface; and we decided negligent mining would not impose liability where the right of surface support was released: *Jordan v. Clearview Coal Co.*, 270 Pa. 216; *Charnetski v. Miners Mills Coal Co.*, 270 Pa. 459, 463; *Ather-ton v. Clearview Coal Co.*, 267 Pa. 425, 434. The legislature may have been neglectful in not sooner declaring it against public policy for surface owners to release their right of support and in prohibiting such contracts for the future, but it had no power to nullify them for the past.

We now hold negligent mining constitutes a good cause of action, that our declaration "non contra bonos mores and for the general welfare" is all wrong, as is also our judicial judgment as to what constitutes general welfare, applied to an act of assembly. Our judgment yields to the legislature's definition of general welfare, and our right to judicially determine this, as applied to a police power act, falls. But, more important, the right of surface support is reestablished where it has been released, and this affects bituminous coal fields as well, for how can we have running parallel a legislative declared general welfare as to anthracite fields
133 and a court declared general welfare as to bituminous fields treating on the identical subject-matter,—subsidence, in op-position to each other, where the two rights and the danger to life and safety incident to them are precisely alike?

Moreover, this is class legislation,—a subsidence is a subsidence, whatever the underlying strata may happen to be: whether it is bituminous coal, anthracite coal, fire clay or any other mineral; this act affects only anthracite coal.

It is said that there are a million people living in this region. That may be true, but the majority opinion does not mean to assert that anything near that number, or, at the most, more than a very small fraction, is affected by these subsidences, which have been confined practically to a small part of Scranton; they ought to be taken care of, notwithstanding the legislature permitted conditions to exist whereby the surface could be let down and properties destroyed. But these owners knew what they were paying for,—put up their buildings notwithstanding this knowledge,—taking chances. But if the first declaration as to the right to release surface support was wrong, the state should pay; the people are responsible for this condition.

Our decisions covering Public Service laws do not apply, for it was distinctly stated that, where a business was recognized as lawful and not against public welfare, and the statute controls only its method and administration, such control is not affected so as to work confiscation or a destruction of property; in all cases of regulation, the courts inquire whether property has been taken without

due process of law, or contract rights violated. So we have held that contracts are not interfered with or impaired by such laws where compensation is reduced. See *Suburban Water Co. v. Oakmont Boro.*, 268 Pa. 243, 253.

But we have never before upheld a statute that confiscates property; nor does the case of *Nolan v. Jones*, supra, reach the point involved in this case. I do not quite comprehend what is meant by the discussion that the act does not "in any true, legal sense, contemplate the taking of private property for public use, or transferring it to another," unless it is meant that actual seizure is necessary, for, under this act, it is just as certain as anything can be that one-fourth to one-third of the coal must remain in place for surface support, for the coal owner, under the Kohler Act, will scarcely provide artificial support, by concrete or stone pillars, or otherwise, at a cost greatly exceeding the value of the coal. Of course, later, the Fowler Act permits its removal as indicated.

The fact the bill does not suggest any such purpose has nothing to do with the intent of the legislature, here enforced by injunction; nor does reference to the different acts regulating the mining of anthracite and bituminous coal. Different rules and regulations must be adopted for different mines, according to working conditions.

Decisions cited in relation to the liquor, oleomargarine or other business are distinguishable in that they are real exercise of police power, and where relief was not obtainable in any other way. The mining of coal is an important factor in our lives. Coal must be procured that people may live; it is only recently that this court has given expression to such thought: *Pioneer Coal Co. v. Cherry-tree R. R. Co.*, 272 Pa. 43, 52. The effect of these laws is to further embarrass the production of coal and reduce the output, as well as confiscate a well defined property right in the land.

To summarize, the Kohler Act, as it appears to me, is a confiscatory provision, under the guise of a police provision, for the following reasons:

1. It is entirely unnecessary, in order to protect life, to forbid mining of coal. A notice such as I have suggested would fully protect all except those who, being at full age and sound mind, voluntarily go where they have no right to be in safety.

2. The provisions of the Fowler Act clearly show that this is merely part of a scheme to force the coal companies to support the surface of owners, who have either for value released the right of support or have purchased their lots for a less price by reason of not acquiring this right with their purchase.

3. I can conceive of no reason, if it be necessary for the public good the surface be supported, why, as in the case of the Rent Laws, fair compensation should not be provided, save only the desire of the beneficiaries to get something for nothing.

4. If this law were in good faith intended to protect lives and safety from cave-ins caused by underground mining, it would protect from all such subsidences. The paper books now before us show cases in the appellate courts of this state covering more litigation over subsidences due to bituminous mining than to anthracite.

5. Prior Pennsylvania legislation provided adequate protection to the property of all surface owners except such that had released such protection. It was for the sole benefit of this class that the Kohler Act was passed.

6. The Kohler Act, in effect, confiscates defendant's coal for plaintiff's benefit. Defendant's right to mine its coal on condition that it accept the Fowler Act and pay two per cent on the value of its total tonnage, or its right to mine on spending on artificial support many times the value of the coal, are rights so obviously illusory as merely to emphasize the real purpose of the act,—to require the coal to be left for all time for the use of the surface owner.

The entire purpose and design of this legislation is clearly, to my mind, to force the coal companies, who have already paid for this property right once, to pay for it again, and to give to the surface owners a valuable right for which they have already been
136 paid by the parties from whom they now receive it for nothing.

I would affirm the decree of the court below.

Endorsement: 234. In the Supreme Court of Pennsylvania, Eastern District. No. 290, January Term, 1922. H. J. Mahon and Margaret Craig Mahon, Appellants, v. Pennsylvania Coal Company. Appeal from Decree of Court of Common Pleas of Luzerne County. Argued April 17, 1922. Dissenting Opinion, Kephart, J. Filed in Supreme Court Jun. 24, 1922. Philadelphia.

137 In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922.

No. 290.

H. J. MAHON and MARGARET CRAIG MAHON, Appellants,

vs.

PENNSYLVANIA COAL COMPANY, Appellee.

Petition for Writ of Error.

To the Honorable Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania:

And now comes Pennsylvania Coal Company, Appellee, and represents that on the 24th day of June, 1922, a final judgment was duly

entered by the Supreme Court of Pennsylvania reversing the decree entered by the Court of Common Pleas of Luzerne County in a suit in equity where H. J. Mahon and Margaret Craig Mahon were plaintiffs and Pennsylvania Coal Company was defendant and awarded costs in favor of plaintiffs.

That this was a suit in equity to restrain the defendant from mining coal from beneath the dwelling house of the plaintiffs so as to cause the subsidence of said dwelling; that the said plaintiffs showed that they were the owners of a certain lot of ground situate in the City of Pittston, Pennsylvania; that the plaintiffs' predecessor in title derived title to the land by deed from defendant which said deed granted only the surface or right of soil of the lot and reserved to the defendant the right to mine and remove all of the coal from under said surface without any liability for damages to the said surface by reason of mining and removing said coal. That the plaintiffs claimed that the mining of coal under the surface of said dwelling would be in violation of the Act of Assembly of the Commonwealth of Pennsylvania approved May 27, 1921, P. L. p. 1198.

And your petitioner avers that in its answer to said bill of complaint it was expressly charged that the said Act of Assembly of May 27, 1921 was unconstitutional (1) in that it impaired the obligation of the contract between Alexander Craig, the plaintiffs' deviser, and the defendant in violation of Section 10 of Article I of the Constitution of the United States of America; and (2) in that it deprived the defendant of its property without due process of law and without just compensation therefor and denied to the defendant the equal protection of the laws in contravention of the 14th Amendment to the Constitution of the United States of America; all of which fully appears in the records and proceedings of the case and is set forth in the assignment of errors which is filed herewith.

Wherefore your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of Pennsylvania for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated by the Prothonotary of the Supreme Court of Pennsylvania may be sent to the Supreme Court of the United States as provided by law.

Dated Philadelphia, Pa., the 12 day of July 1922.

REESE H. HARRIS,
HENRY S. DRINKER, JR.,
FRANK W. WHEATON,

Attorneys for Petitioner and Plaintiff in Error.

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Order.

After consideration of the foregoing petition for writ of error, it is ordered that an appeal to the Supreme Court of the United States from the decree heretofore filed and entered herein be and the same is hereby allowed, and that a certified transcript of the record, testi-

mony, exhibits, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States. It is further ordered that the bond on appeal be fixed at the sum of \$2,500.

Dated, Philadelphia, Pa. July 12 1922.

ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

Endorsement: In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922. No. 290. H. J. Mahon and Margaret Craig Mahon, Appellants, vs. Pennsylvania Coal Company, Appellee. Petition for Writ of Error. Order. Filed in Supreme Court Jul. 12, 1922. Philadelphia. Reese H. Harris, Henry S. Drinker, Jr., Frank H. Wheaton, Attorneys for Plaintiff in Error.

140 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of Pennsylvania.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said appeal, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between H. J. Mahon and Margaret Craig Mahon and Pennsylvania Coal Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the

141 Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said Pennsylvania Coal Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 12th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

[Seal of the District Court of the United States, E. D. Penna.]

GEORGE BRODBECK,
*Clerk of the United States District
Court for the Eastern District of
Pennsylvania.*

Allowed by
ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

[Endorsed:] Supreme Court of the United States, October Term, 11-. Pennsylvania Coal Company, Plaintiff-in-Error vs. H. J. Mahon and Margaret Craig Mahon, Defendants-in-Error. Writ of Error. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

142 In the Supreme Court of Pennsylvania, Eastern District,
January Term, 1922.

No. 290.

H. J. MAHON and MARGARET CRAIG MAHON, Defendants-in-Error,
vs.

PENNSYLVANIA COAL COMPANY, Plaintiff-in-Error.

Citation.

To H. J. Mahon and Margaret Craig Mahon, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the office of the Prothonotary of the Supreme Court of Pennsylvania in the Eastern District, wherein Pennsylvania Coal Company is plaintiff-in-error and you are defendant-in-error, to show cause, if any there be, why the judgment entered against the said plaintiff-in-error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable the Chief Justice of the Supreme Court of Pennsylvania, this 12th day of July 1922.

[Seal of Emma A. Henkelman, Notary Public, Scranton, Pa.]

ROBT. VON MOSCHZISKER,
Chief Justice of the Supreme Court of Pennsylvania.

COMMONWEALTH OF PENNSYLVANIA,
County of Lackawanna,
City of Scranton, ss:

Robert G. Coglizer, being duly sworn, says: I served the within citation personally upon H. J. Mahon and Margaret Craig Mahon July 26, 1922, by giving each of them a true copy at their home, No. 7 Prospect Place in the City of Pittston, Luzerne County, Pennsylvania.

ROBERT G. COGLIZER.

Sworn and subscribed before me this 27th day of July, A. D. 1922.

[Seal of Emma A. Henkelman, Notary Public, Scranton, Pa.]

EMMA A. HENKELMAN,
Notary Public.

My commission expires April 1, 1923.

Costs of Service:

Fees for serving each defendant at \$1.50.....	\$3.00
Traveling expenses.....	2.00
Total	<u>\$5.00</u>

143 [Endorsed:] In the Supreme Court of Pennsylvania, Eastern District, January Term, 1922. No. 290. H. J. Mahon and Margaret Craig Mahon, Defendants in Error, vs. Pennsylvania Coal Company, Plaintiff in Error. Citation. Filed in Supreme Court Jul. 12, 1922. Philadelphia.

144 Know all men by these presents, that we, Pennsylvania Coal Company, as principal, and American Surety Company of New York, as sureties, are held and firmly bound unto H. J. Mahon and Margaret Craig Mahon in the full and just sum of Twenty-five hundred dollars, to be paid to the said H. J. Mahon and Margaret Craig Mahon, their certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 15th day of July, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a Term of the Supreme Court of Pennsylvania for the Eastern District, as of January Term, 1922, No. 290 in a suit depending in said Court, between H. J. Mahon and Margaret Craig Mahon and Pennsylvania Coal Company, a decree was rendered against the said Pennsylvania Coal Company, and the said Pennsylvania Coal Company having obtained a writ of error
 145 and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said H. J. Mahon and Margaret Craig Mahon citing and

admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Pennsylvania Coal Company shall prosecute writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

PENNSYLVANIA COAL COMPANY, [SEAL.]
By W. A. MAY,

President.

AMERICAN SURETY COMPANY OF [SEAL.]
NEW YORK,

By CARL B. WEED, [SEAL.]
Resident Vice-President.

Attest:
[SEAL.] ROBERT T. ROUSE,
Resident Assistant Secretary.

Sealed and delivered in presence of
A. J. MELLOR,
Asst. Treasurer.
E. C. RIEBEN,
As to Surety.

Approved by:
[SEAL.] ALEX. SIMPSON, Jr.,
*Associate Justice of the Supreme
Court of Pennsylvania.*

Duplicate 665,957 A.

Endorsement: In the Supreme Court of Pennsylvania, Eastern District, Jan. T., 1922. No. 290. H. J. Mahon & Margaret Craig Mahon, Defts. in Error vs. Pennsylvania Coal Co., Plff. in Error. Bond. Filed in Supreme Court Jul. 21, 1922. Philadelphia.

146 In the Supreme Court of the United States.

H. J. MAHON and MARGARET CRAIG MAHON, Defendants in Error,
vs.

PENNSYLVANIA COAL COMPANY, Plaintiff in Error.

In Error to the Supreme Court of Pennsylvania, January Term,
1922.

No. 290.

Assignment of Errors.

And now comes Pennsylvania Coal Company, petitioner and plaintiff-in-error and files the following assignment of errors upon which it will rely on its prosecution of the appeal in the above

title came from the decree made by the Supreme Court of Pennsylvania on the 24th day of June, 1922.

I.

The Court acted in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act regulating the raising of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties," approved May 27, 1922, was constitutional and would not impair the obligation of the contract between Alexander Craig and the defendants in violation of Section 10 of Article I of the Constitution of the United States of America, which provides as follows:

"No state shall * * * pass any bill of attainder, ex post facto law, or law impairing obligation of contracts, or grant any title of nobility."

II.

The Court acted in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act regulating the raising of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties," approved May 27, 1922, was constitutional and would not deprive the defendants of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States of America, which provides as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

III.

The Court acted in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act regulating the raising of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties," approved May 27, 1922, was constitutional and would not deny to the defendants the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States of America which provides as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

The Court erred in holding that the Act of Assembly of the Commonwealth of Pennsylvania entitled "An Act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties," approved May 27, 1921, was constitutional and would not deprive the defendant of its property without just compensation therefor in violation of the 14th Amendment to the Constitution of the United States of America, which provides as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any persons of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Wherefore, your petitioner, the plaintiff-in-error, prays that the said decree of the Supreme Court of Pennsylvania may be reversed and the said Act of Assembly be held unconstitutional.

Dated, Philadelphia, Pa., July 12, 1922.

REESE H. HARRIS,
HENRY S. DRINKER, Jr.,
FRANK H. WHEATON,
Attorneys for Plaintiff-in-Error.

149 [Endorsed:] In the Supreme Court of the United States. Error to Supreme Court of Pennsylvania, January Term, 1922. No. 290. H. J. Mahon and Margaret Craig Mahon, Defendants in Error, vs. Pennsylvania Coal Company, Plaintiff in Error. Assignments of Errors. Filed in Supreme Court Jul. 12, 1922, Philadelphia. Reese H. Harris, Henry S. Drinker, Jr., Frank H. Wheaton, Attorneys for Plaintiff in Error.

150 COMMONWEALTH OF PENNSYLVANIA, .
County of Philadelphia, ss:

I, Rudolph M. Schick, Prothonotary pro tem. of the Supreme Court of Pennsylvania, in and for the Eastern District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct copy of the whole and entire record in the case of H. J. Mahon and Margaret Craig Mahon vs. Pennsylvania Coal Company at No. 290 January Term, 1922, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record and of the whole of the original thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court, at Philadelphia, in the County of Phila-

delphia, in the said Eastern District of Pennsylvania, this Twenty-seventh day of July in the year of our Lord One Thousand Nine Hundred and Twenty-two.

[Seal of the Supreme Court of Pennsylvania, 1776.]

RUDOLPH M. SCHICK,
Prothonotary pro Tem.

[Endorsel:] No. —, January Term, 192-. — — — vs. —
—, Exemplification.

151 I, Robert von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, do hereby certify, That Rudolph M. Schick was, at the time of signing the annexed attestation, and now is, Prothonotary pro tem. of the said Supreme Court of Pennsylvania, in and for the Eastern District, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this 13th day of July one thousand nine hundred and twenty-two.

ROBT. VON MOSCHZISKER,
Chief Justice.

I, Rudolph M. Schick, Prothonotary pro tem. of the Supreme Court of Pennsylvania, in and for the Eastern District, do certify, That the Honorable Robert von Moschzisker by whom the foregoing Certificate was made and given, was, at the time of making and giving the same, and is now, Chief Justice of the Supreme Court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Supreme Court of Pennsylvania, in and for the Eastern District, at Philadelphia, this 13th day of July one thousand nine hundred and twenty-two.

[Seal of the Supreme Court of Pennsylvania, 1776.]

RUDOLPH M. SCHICK,
Prothonotary pro Tem.

Endorsed on cover: File No. 29,099. Pennsylvania Supreme Court, Term No. 549. Pennsylvania Coal Company, plaintiff in error, vs. H. J. Mahon and Margaret Craig Mahon. Filed August 17th, 1922. File No. 29,099.

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IN THE
Supreme Court of the United States.

October Term, 1922. No. 549.

PENNSYLVANIA COAL COMPANY,
Plaintiff-in-Error,
vs.

H. J. MAHON and MARGARET CRAIG MAHON,
Defendants-in-Error.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF ON BEHALF OF SCRANTON SURFACE
PROTECTIVE ASSOCIATION IN SUPPORT
OF THE DECREE OF THE SUPREME
COURT OF PENNSYLVANIA.

1. PRELIMINARY STATEMENT.

The bill is filed by owners of the surface, who have by a valid contract parted with the right to support from subjacent minerals. The cause was instituted for the purpose of raising the broad question of the

constitutionality of the so-called Kohler Law of May 27, 1921 (P. L. Penna. 1198).

The trial court apparently held that the plaintiffs were merely attempting to repudiate a valid sale of a property right. It would seem clear from the opinion of the trial court that it treated the bill as one brought to prevent damage to property merely, and as being no broader than this. This is evident from the language of the learned trial Judge, who found it only necessary to determine that, as he put it, the bill "contains no averment upon which to base, by implication or otherwise, any finding of fact that any interest, public or private, is involved * * * except the private interest of the plaintiffs **in the prevention of private injury**"; and he adds that the statute "applied to the case stated in this bill impairs the obligation of a contract, and, for the private benefit of one, takes the use of private property from another without compensation."

The quoted language seems to us to mean that the trial court held that this is a controversy merely over **private** property rights.

In the Supreme Court of Pennsylvania the plaintiffs and other parties who intervened on behalf of the plaintiffs contended that the plaintiffs must be treated as attempting to enforce the public policy enunciated by the Act, in spite of their private interest. The Supreme Court of Pennsylvania took this view of the litigation and thus found it necessary to examine the question whether the Act was a valid police regulation which had been invoked in the manner specified in the Act for raising the question.

Apparently the parties sought to bring the case squarely within the Act (1) by a notice given by defendant to plaintiffs that its mining would unquestionably cause a subsidence of plaintiffs' land with conse-

quent loss and damage, thus bringing the defendant strictly within the terms of the first section of the Act; (2) by an averment in the bill that what the defendant proposed to do would be a direct violation of the prohibitions of the Act; and (3) by an answer on the part of defendant that what it proposed to do would be a violation of the Act. (See paragraph twelfth of plaintiff's bill and the corresponding paragraph of defendant's answer.)

We take it that this Court will not review the decision of the Supreme Court of Pennsylvania on the question whether the filing of the bill in this case was a proper method of enforcing the public policy declared by the Act. That question is one arising under the law and practice of the State of Pennsylvania and is unaffected by any constitutional provision. Assuming, therefore, that the constitutionality of the Act was raised in a proper proceeding, we must call attention to the fact that the parties were content to go to hearing on bill and answer without proof of many facts which seem to us vitally necessary to determine whether the Kohler Law was a proper exercise of the police power of the Commonwealth of Pennsylvania. We shall refer hereafter more specifically to the bareness of the record of essential facts to support appellant's contentions herein.

2. SCOPE OF THIS ARGUMENT.

We are advised that appellees and other parties will in their briefs very completely cover the necessity for and genesis of the legislation in question and will argue the constitutional questions involved at some length. We do not desire to duplicate argument, and we shall therefore confine ourselves to a somewhat general argument.

3. THE STATUTE AN ALLEGED FRAUD.

Appellant insists here, as it did below, that the Kohler Act is not a bona fide exercise of the police power. It alleges that the statute is a fraud perpetrated by private owners and politicians upon the owners of minerals, because under the guise of police regulation it is seeking to recapture for surface owners rights of support which they have bargained away. Appellant's argument in the court below was redundant with such assertions, slightly varying in phraseology. It devotes pages of its brief in this Court to the same argument. As we analyze this argument it comes to this: That whereas the Legislature unanimously adopted this legislation as necessary for the protection of the life and health of the citizens of the Commonwealth and declared that a great public crisis required the passage of the legislation, and whereas the Governor of Pennsylvania in a most lucid and convincing message gave his reasons for signing the bill, this Court is to say that this was all a fraudulent scheme of private property owners and politicians to wrest from the mine owners the right to destroy the surface and the structures thereupon, which right they had purchased from the owners of the surface.

It is to be remarked that if such be the case it would seem to have been incumbent upon appellant to adduce proof in the trial court that the robbing of pillars and the dropping of the surface had not and would not in all likelihood endanger the health, life and safety of the communities which have grown up over anthracite strata. **The record is bare of either averment or proof on this subject.** Can it be possible that this Court, without pleading or proof before it on the subject, will set aside the will of the people of Pennsylvania as expressed by its Legislature and put the stamp

of improper purpose upon what purports to be remedial and beneficial legislation upon the mere *ipse dixit* of those who are confessedly attempting to defend their private property rights which, by the pronouncement of the Act, have come into conflict with the public health and safety.

Appellant's brief filed in this Court (p. 10) does indeed admit that it is necessary for those attacking the Act to base their contentions on what is apparent on the face thereof. We again assert that in **this case** the appellant has nothing else, for it neither alleged nor proved **any facts** bearing upon the controversy.

We submit that the argument which appellant presents, drawn from the language of the statute, is not convincing. It is attempted to demonstrate that no one except persons who have waived the right to surface support need the protection of the Act. This is a mere bald statement not supported by any facts in the record. In the first place, people who may have a perfect right to go upon the Mahon land for one purpose or another are equally liable to have their lives endangered as are the Mahons. The subsidence of the Mahon lot may and probably would cause subsidence of an adjoining street, resulting in injury to persons using the same. The public, moreover, has a very real interest to prevent the caving in of areas in the heart of towns and cities with all the attendant breakage and damage to gas mains, sewers, water mains, and other structures; albeit the private owner of a particular bit of surface could not, because of his prior deeds or contracts, claim a private damage to his property.

It is suggested that the persons who have not bargained away the right to surface support would have the right to inspection and injunction. This Act has nothing to do with the rights of private individuals,

but attempts to confer a public right and vests a power in municipal authorities to exercise supervision and inspection in behalf of all the public.

It is suggested that the Act is unreasonable in excluding from its operation land lying in townships of the second class. Under the law of Pennsylvania such townships are those having a population of less than three hundred to the square mile. It seems axiomatic that the dangers from subsidence are vastly less in a sparsely populated community than in a thickly populated one, and it would be an affectation to cite the cases wherein this Court has held that reasonable and proper discrimination may be applied in the exercise of the police power in communities differently situated.

It is suggested, and this Court is apparently asked to take judicial notice of the alleged fact, that there is just as much danger of subsidence of the surface overlying iron, zinc or bituminous coal mines as of that overlying anthracite strata. We ask, will this Court take judicial notice of any such proposition without either averment or proof concerning it? We might reply that the geology of the soft coal regions and of the iron districts is different from that of the anthracite regions, and the danger so small as not to require legislative intervention. Would this Court, without allegation or proof, take our statement that the danger is not the same in the case of iron mines, that it is not the same in the case of bituminous coal mines, or zinc mines? If these considerations are important, are they not sufficiently so to warrant appellant's making some averment concerning them in its sworn answer or offering some proof on the subject.

Such matters as those above mentioned show that what appellant is really trying to do is to read into the

record of this case facts which are not there and facts which would be vitally necessary to a determination by this Court of the propriety of the exercise of the police power evidenced by the Act.

Appellant refers to the Fowler Act (p. 17 of appellant's brief), and argues that the real purpose of the Act now under discussion was to drive the coal miners into an acceptance of the provisions of the Fowler Act. A fairer statement of the situation would be that the Fowler Act was enacted to enable the coal miner to escape the possible hardships which might accrue to him by reason of the Act now under discussion. Appellant's argument, if we may paraphrase it, is this: The Kohler Act forbids (this is untrue, as we shall hereinafter show) the mining of any coal under certain places used for human habitation or congregation. This was intended to drive the coal miners to accept the provisions of the Fowler Act, and when they do so accept those provisions they may, merely by the payment of a small tax upon each ton of coal mined, buy immunity for themselves so that they may continue to mine, as before these Acts were passed, and rip out every shred of surface support without any liability whatsoever.

This would be a serious indictment of these pieces of legislation if true. But a glance at Sections 14 and 15 of the Fowler Law will show that this is a misstatement of the effect of the law. Those sections provide that an owner or operator who accepts the provisions of the Fowler Act must apply to a skilled commission for permission to mine in any area where mining is prohibited by the Kohler Law, and that he may not mine in such an area unless and until the commission shall have found it safe for him so to do, and even then only with such safeguards of life, limb, health and

general welfare as the commission may require the operator to employ. And the Fowler Law then goes even farther, and provides that, if the commission has perchance made an error in permitting the operator so to mine, even with such safeguards, if there be any damage or destruction caused by that mining, the fund provided by the Fowler Act shall be applicable as a sort of insurance fund to indemnify those who do suffer by such mishap, so far as indemnity can make good their legal damage, if any.

It seems to us that appellant is driven to great length and to sore straits when it becomes necessary for it so to misconstrue the joint effect of these two companion pieces of legislation, as is done in its argument.

4. IMPAIRMENT OF OBLIGATION OF CONTRACT.

Appellant's argument upon this point is very brief. It seems to assume the proposition that if the Legislature in the exercise of the police power runs foul of or renders nugatory previous existing contracts, the police power must recede and give way to such antecedent contractual rights. Of course there is no countenance for any such proposition, and counsel for appellant would not put the proposition in that bald form.

What they have done, however, is entirely to misquote and misconceive the very words of the Act. They have attempted to read into the Act what is not there; and having done this, to argue that the Act, as they construe it, **amounts to an absolute prohibition** of the use of the coal which has been acquired by valid contract, as has also the right to destroy the surface.

In appellant's argument, great stress is laid upon the fact that the coal itself is real estate, that the

surface is real estate, and that in the fee there is still a third estate, namely, the right of support, which the surface owner may bargain away by a valid contract, and that wholly to deprive the owner of the minerals from removing those minerals, because to do so would interfere with the surface support, is to violate the obligation of the contract whereby the surface owner bargained away that support.

The catch in the argument is that appellant does not quote or fairly interpret the Act itself. It reads (Section 1):

"That it shall be unlawful for any owner, etc.,
 . . . of . . . any anthracite coal mine . . . ,
 so to mine anthracite coal or so to conduct the
 operation of mining anthracite coal, as to cause
 the caving in, collapse or subsidence of"

certain sorts of buildings where human beings congregate or live.

Appellant's argument below was replete with the statement that this language meant that a certain amount of valuable coal **must remain in place and never could be removed or turned to account by its owner.** Note that the Act does not say so. Note that there is not one word in the pleadings which says so. Note that there is no proof before this Court in this case that a mine owner cannot in some way, with or without extraordinary expense, take out every pound of coal beneath the surface without, in the words of the Act, causing "the caving in, collapse or subsidence" of the surface. There have been cases decided by the Supreme Court of Pennsylvania where it was found that the strata were such that no subsidence was to be apprehended from certain mining operations. (*Scranton vs. Scranton Coal Co.*, 256 Pa. 322, at page 326.)

We ask, is it fair for appellant to allege that this Act lays the dead hand of the law upon all anthracite mines and as to all anthracite mines makes it impossible to take out the mine owner's property, to wit, the coal, and compels him to leave it forever underground? **Ought not such an assertion be based upon either pleading or proof, or both? The record is bare of either.** It would seem rather a long stretch, after the Legislature has declared a public policy, having in mind, as we must assume it had, the rights of both the public and the property owner, for a court without either averment or proof, to take judicial notice of so complicated and difficult a matter as the question whether coal can be taken out generally, or sometimes, or always, without surface subsidence, by certain engineering or mechanical means or inventions. Will this Court place itself in the position of judging so complicated a question and upon that judgment found a decision that an act is unconstitutional, without the aid of a single line of proof on the subject? We think not.

This argument of appellant comes then to this: That if it contends the mere abrogation of a contract by a police regulation is contrary to constitutional principles, it is met with a host of decisions of this Court, too recent, too well known, even to justify citation, which refute its position. If, on the other hand, it takes the position that this Act inevitably destroys all the valid contracts whereby the third estate (the right of support) have been bargained away, because it makes impossible the pursuit of mining operations, it has stated something which nowhere appears in this record—which it has not had the hardihood to attempt to prove—indeed, has not even dared to aver in its answer—and therefore it now alleges facts which are non-existent, so far as this case is concerned.

5. DUE PROCESS.

We submit that appellant's position with regard to the due process clause is equally untenable. We understand that the due process clause protects private property from being taken for public use without compensation, and equally protects against private property being taken for another private individual as distinguished from public use.

Appellant argued in the Court below and asserts here that the absolute prohibition of removal of the minerals owned separately from the surface would be a taking of those minerals. We concede that this is so. An injunction forbidding the owner of coal ever to remove it is in effect a condemnation of that coal. But we must again point out that there is not one word in this Act forbidding a coal owner to remove a single pound of the coal he owns. All that the Act forbids is that he shall so remove it as to cause subsidence of the surface in certain proscribed territory.

Again we have merely the bald statement of the appellant, unsupported by averment or proof, that this cannot be done in this very case and under the plaintiffs' very property. Much less do we find any averment that this cannot be done generally throughout the anthracite regions. We submit that if this Act was called for by a general necessity to protect life and health, the mere fact that its enforcement might bear hardly on one or more coal miners and might create so difficult a position for them that they could not avoid themselves of all their coal would not be sufficient to strike it down as a police regulation.

This Court has repeatedly said that the mere fact that a police regulation bears hardly on one or more members of the community is no reason for striking it down, if the majority of the community can live satisfactorily under it.

Incidental to the enforcement of practically every police regulation there is inconvenience and loss to some parts of the community and benefits to others. The mere fact that some are benefitted or some are hurt is no argument for or against the validity and constitutionality of the regulation.

Literally thousands of cases might be cited where, due to the enforcement of a police regulation, a party who was bound prior to such enforcement by a contract or a duty to his neighbor, is in effect relieved from the obligation of that contract. Such incidental gain to one neighbor as against another is no argument against the validity of the regulation. The appellant, in the Court below, constantly argued that this legislation must be struck down because in this particular case and in some others suggested it gave to a surface owner a protection to his property which for value he had bargained away. But this argument wholly loses sight of the great overruling public policy of the State which stands for the protection of the life not only of the surface owner but of his visitor, his neighbor, the man who passes his property on the street, and perhaps hundreds of others in no way related to him. If incidental to protecting the life of the community the statute protects property which, by reason of his contracts, the surface owner had no right to have protected, this mere incidental protection of the surface owner's property is not a reason to strike down the whole police regulation of the State. To permit it to do so would be to allow the mere incidental or accidental to become the fundamental.

Respectfully submitted,

PHILIP V. MATTES,
FRANK W. WALSH,
OWEN J. ROBERTS,

For Scranton Surface
Protective Association.

FILED

NOV 13 1922

WM. P. STANSBURY
CLERK

No. 549

October Term, 1922.

In the
Supreme Court of the United States

Pennsylvania Coal Company

Plaintiff-in-Error,

vs.

H. J. Mahon and Margaret Craig Mahon

Defendants-in-Error.

In Error to the Supreme Court of Pennsylvania

Brief on Behalf of the City
of Scranton, Intervenor

PHILIP V. MATTES,

City Solicitor,

For the City of Scranton.

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PENNSYLVANIA COAL COMPANY Plaintiff-in-Error, vs. H. J. MAHON and MARGARET CRAIG MAHON, Defendants-in-Error.	}	IN THE SUPREME COURT OF THE UNITED STATES No. 549, October Term, 1922.
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**BRIEF ON BEHALF OF THE CITY OF
SCRANTON, INTERVENOR**

I. Scranton's Interest in the Case.

A word of explanation may be due the Court as to the reasons impelling the City of Scranton and various public or semi-public bodies to appear before the Supreme Court of Pennsylvania and before this court. The statute under attack was enacted as a result of many years of effort by the citizens of the anthracite region and particularly of Scranton, a city of 137,000 people, the metropolis of the hard coal fields and the third city of Pennsylvania.

The leadership of Scranton and Lackawanna County in the movement was the natural effect of greater sufferings from the mine cave evil than those experienced in other counties where mining was in a less advanced stage or greater care was exercised.

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The Kohler Law went into effect August 27, 1921. Four days later the Pennsylvania Coal Company served a notice upon the Mahons of its intention to violate the Act, and seven days thereafter this case, frankly admitted in the petition to advance to be a test case, was started in the courts of Luzerne County and was promptly disposed of by opinion of the Chancellor, holding the Act unconstitutional without even hearing oral argument.

Under the circumstances, the Supreme Court of Pennsylvania, upon appeal, permitted briefs to be filed in support of the statute by the Attorney General of Pennsylvania, the Scranton Surface Protective Association, the Scranton Gas & Water Company and the City of Scranton. The Attorney General, the Assistant Attorney General, and Owen J. Roberts, Esq., on behalf of all the other intervenors were also heard in oral argument.

II. The Rise of the Mine Cave Evil.

In the early days of anthracite mining, operations consisted entirely of what is now known as "first mining." It was the general and well recognized practice of the coal operators to remove approximately two-thirds of the coal, leaving the remainder in pillars to uphold the roof, and then abandon that portion of the vein, tearing up their tracks and applying for and receiving complete exoneration from further taxes on the pillar coal as

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"unmineable." Under these mining practices, the waivers in the deeds of the overlying surface were looked upon merely as a form of insurance against casual acts of carelessness rather than as indicative of a purpose to devastate large areas which the operators themselves had plotted and sold as building lots to their employes and others. Later, as the so-called "cutthroat" waiver of damage clauses were universally upheld by the courts, pillar robbing operations beneath built up sections became quite common, little or no regard frequently being shown for the safety of those whose homes were tumbled down about their heads. Some little moral obliquy seemed to attach to operators who displayed apparent indifference to the fate of their neighbors. In consequence, there has grown up a system of "scavenger coal companies," as they are sometimes called, small corporations composed of a group of favored individuals to whom one of the large operators leases upon royalty a limited section of pillar coal that is too dangerous for the large operators to take a chance with. Often the lease stipulates that the surface is not to be disturbed by operations that are bound to disturb it, but it is generally understood that such a stipulation is for public consumption only and not to be taken seriously. The operating company has no assets but its lease and is therefore not at all concerned whether the territory allotted to it for exploitation is entitled to surface support under the deeds or not. The lessor company gets its royal-

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ties for the coal, the officers of the operating company get their salaries, and the operating company itself is prepared to perish as a total loss as soon as the last pillar is gone, replaced only by a few wooden props that must soon give way. In the meantime these gentlemen have terrorized a whole community, destroyed vastly more property than they have created, and impoverished not merely their unfortunate individual victims but the Commonwealth itself.

The court can get a clear idea of the high-handed methods employed by some of these "scavenger" operators and their utter contempt not merely for the rights of the surface dwellers but even of the injunctions of the courts by an examination of the opinion of the Court of Common Pleas in *City of Scranton vs. Peoples Coal Company* (a sub-lessee of the D., L. & W.), 28 Lackawanna Jurist 17, and the opinion of Justice Simpson, affirming judgment in the same case, in 274 Pa. State Rep. 68.

Such a system would seem to demand a change in the law, but the conservatism of our people and of our legislators who hesitated to place any restrictions upon the anthracite industry, delayed this change, year after year, until conditions became intolerable.

*Brief of Argument.***III. The Extent of the Mine Cave Evil.**

Although practically all of the cities and towns of the anthracite region were beginning to feel the effects of unrestricted mining, the metropolis of the field has had to bear the brunt of the chief devastation due to the fact that our coal veins have been more extensively worked and are therefore nearer exhaustion than those in other sections.

Scranton bid fair to become a second Verdun, her buildings razed to the ground by shots from below. While every section of the city was more or less affected the worst devastation was in the heart of the business section of West Scranton. Visitors there today can clamber through pits strewn with broken brick and rubbish covering great areas formerly improved with handsome business blocks but now permitted, in the words of Governor Sproul, "to revert to the wilderness of abandon." Our once level streets are in humps and sags, our gas mains have broken, our water mains threatened to fail us in time of conflagration, our sewers spread their pestilential contents into the soil, our buildings have collapsed under their occupants or fallen into the streets, our people have been swallowed up in suddenly yawning chasms, blown up by gas explosions or asphyxiated in their sleep, our cemeteries have opened and the bodies of our dead have been torn from their caskets. The facts set forth in the preamble of

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the Kohler Law can never be successfully denied. An attempt has been made by the plaintiff-in-error to impeach the good faith of the Legislature in its recital of conditions in the preamble of the Act and they are charged with legislating under false pretenses. Something more, however, than a bare assertion should be required to prove the charge. Judicial bodies are not prone to convict legislative bodies of utter falsehoods or attempting to deceive the courts unless the evidence in the case clearly establishes the fact. The present record discloses no attempt whatever made to negative by any word of testimony the solemn declaration set forth in the preamble of the Act—facts personally known to most of the legislators and every phrase provable by all too many instances:

“Whereas the anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such manner as to remove the natural support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, stores and private dwellings, broken gas, water and sewer systems, the loss of human life, and in general so as to threaten and seriously endanger the lives and safety of large numbers of the people of the Commonwealth.

Governor Sproul for years has been familiar with the mine-cave menace from personal knowl-

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edge. In his opening message at the last session, he recognized the situation and called it forcefully to the attention of the legislative body:

Legislative Journal, Jan. 18, 1921, page 34:

"We have a great problem to meet in all of our coal mining districts, and especially in the anthracite region in making provisions against the depletion of the coal areas, in guarding against future and present dangers incident to the industry, and making reparation of damage to public and private property, to the communities and to the whole prospect of life there. * * * *

We cannot longer sit here in snug indifference to our responsibilities as officials and as citizens. The men and women of another generation will wonder what sort of folks lived in this state in the Nineteenth and Twentieth centuries as they contemplate deserted and ruined cities, abandoned industries and a desolate wilderness where once were teeming communities, and realize that a little foresight might have saved, or at least mitigated such conditions."

After the passage of the acts, Governor Sproul granted a special hearing to the operators, heard their engineering experts at great length, considered the same legal arguments that are now being advanced against them, and, after consultation with the Attorney General, signed the bills, at the same time issuing a public statement of his

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reasons for so doing quoted in part by the court, that is unanswerable:

"I regard the enactment of this mine cave legislation as a great progressive step. For half a century thoughtful people have realized that something must ultimately be done to prevent the complete desolation of the anthracite region, and for a generation the appeal to the Commonwealth to save the situation has been heard here at the capital. In Scranton, the third city of our state, a fair and beautiful city which would be the metropolis were it located in any one of one-third of the states of our Union, the conditions have become especially acute and disastrous. Lives have been lost, homes, churches and schools destroyed, and an ever-present peril has threatened the morale of the entire community. The same conditions will continue and spread elsewhere unless something definite and tangible is done toward putting an end to this menace.

"Wars and pestilence and misgovernment destroyed the great cities of old. Surely in these enlightened times we must not sacrifice our communities to industrial carelessness or civic neglect, nor can we, as Americans of this day and generation, allow important parts of this God favored state to revert to the wilderness of abandon and permit splendid counties to become forsaken mining camps, unsightly and forlorn.

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"There may be imperfections in this legislation and some unevenness in its plan of operation as applied to different sections, but I feel that it is a start toward a work that has been too long deferred. It has been opposed, as all of our humane enactments have been opposed, and particularly the mine safety code, the compensation acts and the laws protecting women and children. Like these, I believe this new legislation will soon justify itself, and that in a few years as a result of it we shall remove a great reproach from our twentieth century Pennsylvania."

Surely a severe indictment. Do the coal operators plead not guilty? They do not. Not a word of answer or denial of the Governor's charges. Practically admitting the facts to be true, they content themselves with demurring on the ground that the "internal evidence afforded by the act itself" reveals to them that a resort to the police power under these facts is a fraud.

We believe that the Governor considers this legislation as one of the outstanding constructive achievements of his administration with the promise that has been brought of a final solution of one of the state's most perplexing problems so far as that problem can be solved by legislation. Mining has already progressed so far in Scranton that we will always have more or less danger from the caving of old workings. But the interest which the community has in the industry and the American spirit

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of fair play will never allow these laws to be used in an arbitrary spirit of oppression. Should it prove otherwise, the laws will be quickly repealed.

IV. History of Mine Cave Legislation in Pennsylvania.

Although, as Governor Sproul says, for a generation the appeal to the Commonwealth to save the situation has been heard at Harrisburg, this appeal was effectively stifled so far as any legislation was concerned until the session of 1911.

Under the resolution of March 24th, 1911, (P. L. 26; 6 Purdon 6631) a commission was appointed to study the question. The commission accomplished nothing, being completely dominated by representatives of the operators. In 1913, the Legislature passed an anthracite tax act on June 27th, (P. L. 639; 6 Purdon 6639) designed to refund one-half of the tax to the communities where the coal was mined, the thought being to help recompense for the damage caused by mine caves. This act was declared unconstitutional. Two other acts were passed during the same session as police power measures, one of which was vetoed and the other, the Act of July 26th, (P. L. 1439; 6 Purdon 6626), known as the Davis Act, relating exclusively to streets, is still in force, and has offered some protection but has been found inadequate as a real solution of the question. In 1915, another

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anthracite tax law was passed on June 1st, (P. L. 721; 6 Purdon 6640), one-half of the tax to be returned to the municipalities as in the Act of 1913. This Act also was declared unconstitutional. In 1917 and 1919 several mine cave bills were vigorously pressed in the Legislature and failed of passage only by narrow margins. These previous efforts, although failures, served to thoroughly familiarize the legislators with conditions in the anthracite field.

In 1920, a State Commission appointed to consider the advisability of adopting a new State Constitution came to Scranton for the express purpose of investigating conditions in the mine cave areas. This Commission included many of the ablest legal minds of Pennsylvania, among them Attorney General Schaffer, who later became a Justice of the Supreme Court of Pennsylvania and participated as such in hearing the case at bar. The Commission conducted several hearings and considered the arguments offered by the operators urging the Commission to refrain from suggesting any disturbance of the existing status. They found that a change was needed and recommended the establishment of a fund for protective and reparative purposes along the lines of the Fowler Law, except that by constitutional provision it could be made compulsory instead of optional. The defeat of the constitutional convention at the

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election in 1921 eliminated this hope for relief and left nothing but the police power to fall back on.

The suggestion has sometimes been made that, at some future time, after an interval which we have no doubt would be busily employed, the Legislature might authorize municipalities already near the constitutional debt limit (largely because of the expense of constant street repairs) to condemn under eminent domain proceedings, coal in place for public protection. This, of course, is a fantastic and impossible remedy and should such a proposition ever be seriously entertained it would be fought by the operators as vigorously as the Kohler Act. It would involve divesting of title and leaving permanently in the ground quantities of coal which could be reclaimed, the surface dwellers being protected by the use of flushing, cogging, rock packing and other well known and commonly employed mining practices. (The steel and concrete pillars feelingly alluded to by appellant are only resorted to in rare instances under very large buildings). Condemnation would also involve, from the operators' standpoint, the loss of a vast freight tonnage to tidewater over railroads with which the operators are on rather friendly terms.

Neither the Commonwealth nor the local communities, nor the coal companies themselves, would be served by eminent domain proceedings which

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would take away the ownership of coal from operating companies and prevent them from removing it and placing it upon the markets of the world regardless of the fact that much of such coal could properly be mined without endangering the public. Suggestions that this is the proper remedy to pursue may be urged by our opponents for the purposes of this case but have never been urged upon the legislature by any of their lobbyists at Harrisburg and never will be. Even were such legislation secured, any attempt to condemn the coal beneath the Mahon's home would doubtless be met by an argument that such a purpose is private and not public. Their real position is that no legislation of any kind was needed; that the status of the people of the anthracite region under the law as it existed before the Kohler Act was quite satisfactory and should have amply satisfied them.

V. How Far May Private Contracts Prevent
A Remedy.

To become more specific with reference to the case at bar, we find brought into this proceeding a private contract between Alexander Craig and the Pennsylvania Coal Company, whereby the latter was given the ostensible right to cave in the former's dwelling without liability for the results. So far as concerns the pecuniary losses or gains between the parties or their successors, neither the courts nor the public need be so much concerned.

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It is true that the average man living in the anthracite region must either dwell on land held for generations back upon some such form of feudal tenure or get out. His necessities well nigh destroy his freedom of contract, and he takes the cutthroat waiver because he must or desert his means of livelihood and the home of his ancestors. Nevertheless, we may assume for the sake of argument that Alexander Craig was a free agent and knew that his home was doomed when he built it, and we are not to waste any sympathy upon him or his heirs for their prospective financial loss. We may even go further. So far as he or his children unto the third and fourth generation are concerned we may say to the defendant company "Go ahead, exercise your vested rights. You have warned them and if they don't get out they are guilty of contributory negligence or worse, and you are justified in bringing their rafters down upon their heads, for so it is nominated in the bond."

But surely here we must stop. Here we must give some heed to the rules of the game—the basic law of civilization: *sic utere tuo ut alienum non laedas*, and the principle that this private contract between Craig and the Coal Company cannot operate to the injury of those not parties to it. If that contract is carried out as it is threatened, a building in a populous city fronting on a public street will collapse. What will happen? No man can tell. But certainly there will be danger and

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perhaps disaster. Passersby may be killed, persons entering the plaintiff's premises on lawful business or social errands may be destroyed. Gas pipes will most certainly be broken and water mains and sewers, spreading their contents in all directions. Telegraph poles with charged wires may be cast into the highway, and fire, pestilence and death may threaten the neighborhood. Did Alexander Craig and the Pennsylvania Coal Company ever have the right to bring these things upon their neighbors by private contract between them? Assuming that they did have that right—assuming that no law against it existed—can we say that a law now passed forbidding these things is so unreasonable, so repugnant to a sense of fairness and justice that it must be set aside as an unconstitutional interference with the vested property rights of Craig and the Company?

If so, we must grant that these two parties between them have not only a vested right to commit a nuisance, but practically a vested right to commit manslaughter.

Many of the waivers on which our cities are built go even further in their verbiage than in the case at bar. They purport to give the right to mine not merely without regard to the destruction of buildings but of "creatures and persons therein." The Kohler Law forbids the exercise of these "rights" in instances where it is reasonable to sup-

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pose that human life will be jeopardized. And it is respectfully submitted that this company has no more vested right to cause the collapse of a dwelling used as a human habitation in a populous city against the sovereign command of the state than to build a powder factory on Penn Square.

No matter how improvident, no matter how reckless a man may be of his own health, life or safety, the state has such concern for its citizen that it has the right in the exercise of its police power to step in and against his will forbid the making or carrying out of contracts which may impair his physical well-being.

In *Commonwealth vs. Beatty*, 15 Pa. Superior Ct. Rep. 5, President Judge Orlady, in an opinion which has been widely cited, after discussing the fundamental principles of the police power, says, page 17:

"But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere when the parties do not stand upon an equality, or when the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed, the state must suffer. This declaration was

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adopted by the United States Supreme Court, in *Holden v. Hardy*, 169 U. S. 866, 42 L. Ed. 780, in validating a state statute which limited the employment of men in underground mines, smelting works, etc., to eight hours a day.

The object of such legislation is the good of the public as well as of the individuals. The fact that the individual is willing to waive protection cannot avail. The public good is entitled to protection and consideration; and if, in order to effectuate that object, there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good."

VI. Is the Kohler Act an Unlawful Exercise of the Police Power?

It is argued that the Kohler Law takes away the property of the defendant without compensation. In the sense that the law will in some cases add to the overhead expenses, this may be so. Fire escapes, safety appliances, child labor restrictions, building regulations and all the infinite complexities of modern civilization which are required by law, all add to the overhead. But here there is no taking of property. It is a mere regulation of the use of it. No coal owner loses title to a pound of his mineral. It is still his. No one else has acquired it or divested the owner's title. It is true that at present prices it may be unprofitable to mine some of it because artificial support (not

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confined to steel and concrete) must be provided. Increasing scarcity and higher prices may make an operation profitable later, which today is unprofitable. The miner is nowhere forbidden to remove coal, however situate, nor does the act go so far as to require that in the removal of coal the surface generally shall be supported. Certain classes of property, all of which are intimately associated with human-kind, the operator must not cause to collapse—not because they are property valuable to their owners, but because their collapse would imperil lives valuable to the state.

Had the act gone so far as to declare that the coal under a dwelling, a church or a school could not be removed but must be left for safety's sake, there might have been more of an argument on the "taking without compensation" theory. But even an absolute prohibition of removal has been held perfectly proper. The anthracite mine law of 1891 required that a barrier pillar be left between adjoining mines in certain cases. No artificial substitute would do. The coal itself must stay.

In *Commonwealth vs. Plymouth Coal Company*, 232 Pa. 141, the Supreme Court of Pennsylvania, adopting the language of Judge Ferris, page 149, says:

"The police power is distinguished from the right of eminent domain in that the state,

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by exercising the latter right, takes private property for public use, thereby entitling the owner to compensation under the constitution, while the police power, founded as it is on the maxim 'sic utere tuo ut alienum non laedas,' is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather destroyed in order to conserve the safety, morals, health or general welfare of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general (and, in this case, also the specific) benefits resulting from the exercise of the police power: 22 Am. & Eng. Ency. of Law (2d ed.) 916, and cases there cited. For example, in the case at bar, the state does not take the coal in the barrier pillar and convert it to a public use, but leaves it in the ownership and possession of the adjoining mine owners. The coal itself is not taken. The property right affected by the statute is not ownership, but use, of the material thing—the right to mine it out. Nor does the state take that right for public use. The act does not transfer the right to mine out the coal from the owner to some one else, for the public benefit, but prohibits that right from being exercised by any one—that is, destroys it, to prevent a possible calamity, to wit, the flooding of mines, and to protect the lives of that class of the general public whose safety would

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be thereby endangered, and, incidentally, to conserve the mine property of the owners themselves. In this latter aspect of the case the destruction of the right to mine the coal bears some analogy to the destruction of buildings to prevent another sort of calamity—a conflagration. True, in the latter case the disaster is imminent, while here it is uncertain; so that perhaps a closer analogy in that respect would be the statute law requiring fire escapes to be placed on certain structures in order to avert a possibly remote catastrophe. Such laws were held to be a valid exercise of the police power of the state in *Fidelity Insurance Trust & Safe Dep. Co. v. Fridenberg*, 175 Pa. 500, 507, 508.

“The enactment here in question does not authorize a taking of property for public use, is not an exercise of the right of eminent domain, and, therefore, is not unconstitutional, because of failure to provide for compensation; but it regulates the use of tangible property—the coal in the pillar—by requiring the owner to use it (negatively by leaving it unmined) as not to injure the rights of others, or, in another aspect of the case, does not affect tangible property at all, but destroys an intangible property right (that of mining out the pillar coal) in the interest of the public safety. In either case it is, in our opinion, an exercise of the police power, justified by the circumstances, and not violative of either the state or the federal constitution.”

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Upon appeal to the Supreme Court of the United States the judgment of the Supreme Court of Pennsylvania was affirmed in *Plymouth Coal Company vs. Penna.* 282 U. S. 538, in which the Court says, page ~~248~~:
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"That the business of mining coal is attended with dangers that render it the proper subject of regulation by the states in the exercise of the police power is entirely settled."

It is argued again and again that the Kohler Law deprives the Company of the benefit of its waiver of damages—that it reverts in the surface owner the right of support or so-called "third estate," which belongs to the coal owner. Such is not the case. Continuous repetition cannot make it so. As between the parties the waiver remains the shield and protection of the coal owner against damage suits. The Company may cave in the Mahon's orchard, fill their lawn with potholes, swallow up their barns and their cows, their garages and their touring cars and neither the plaintiffs below nor the Commonwealth will have a word to say. Not a penny of damages will be recoverable. When it comes to the plaintiffs' dwelling, "used as a place of human habitation," the rights of the plaintiffs to recover damages may remain the same but here the Commonwealth steps in as an interested party for the safety of its citizens, and declares that, whatever the agreement

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between the parties, it can be carried out only up to a certain point. Beyond the danger line it becomes a misdemeanor. A bargain must be lived up to so long as only the parties to it are affected. But when the interests of the public or of the state come into question, private contracts must give way. Counsel for plaintiff-in-error have referred to Shylock. The precedent is hardly one which will lend them much comfort. Shylock was entitled to his pound of flesh. He had bought and paid for it. It was his vested right. But it could only be exercised within the limits imposed by the state for the protection of life. The decree of the Venetian Court holds good today. It is an apt illustration of the effect of the police power upon a private contract:

“Take then thy bond, take thou thy pound of
flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and
goods
Are, by the laws of Venice, confiscate
Unto the State of Venice.”

So, if the Mahon's house is destroyed, an offense will be committed against the state entirely unrelated to any claims for damages on the part of the Mahons. And, since it is always best to lock the barn door before the horse is stolen, the act gives the right to a preventive remedy by injunction on behalf of the upholding of the law, just

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as any citizen would be entitled to make complaint and prosecute after a violation had occurred, whether it concerned his own property or not.

The Mahons have a standing as plaintiffs in this proceeding because they are citizens—not because it is their property which is affected, but in spite of it. Their role is that of prosecutors to prevent, instead of prosecutors to punish. The question of what, if any, damages they might recover in case of subsidence is not involved in the present proceedings.

It boils down to this: Where the coal owner has no waiver he must support **ALL** the surface or pay the man above for the damages caused. Where he has a waiver, he need pay the man above nothing. In either case, however, the state has forbidden him to destroy the places where its people work, sleep and congregate. Necessity itself demands that our cities and our citizens be given a higher value than the slight difference in cost between what we may designate as “surface support coal” and “waiver of damage coal.”

The recent rent cases in the Supreme Court of the United States have shown how far the Courts are ready to go to prevent private contracts from standing in the way of the public welfare.

Old tenants have been relieved of their contracts to vacate at the end of their term and new

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tenants have been deprived of their rights under the leases which they have signed. A housing shortage implies overcrowding and consequently detriment to public health and morals, but the abrogating of leases, old and new, could not relieve overcrowding in the aggregate, though it made a difference as to which individuals were crowded and which were not. The real purpose and effect of the rent laws was to prevent landlords from profiteering, from making too much money out of tenants—primarily a matter of the protection of the purses and property rights of the tenants after all. Since such laws, involving generally only the protection of the property rights of the weaker class of citizens against the stronger are upheld as a valid exercise of the police power, how much stronger is the position of the mine cave laws whose object is the protection of things more valuable than property: life, limb, health and safety! Some kinds of property are incidentally being protected but this protection is only because it is necessary to the protection of human beings. While the list of improvements covered by the Act may appear impressive, the total percentage of the entire anthracite region overlaid by such improvements is relatively insignificant. No protection is sought for personal property against mine caves. Caving of the soil or land as such is not prohibited. If a store or dwelling is vacant, if a factory is idle, it may be destroyed. As before stated, a man may

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improve his land with barns, garages, orchards, and a thousand and one valuable additions and none of these does the Kohler Act seek to protect, because after all, however valuable, they are mere property.

The law goes far enough to protect life, limb and health and not one inch farther.

Counsel argue that the rent cases are really eminent domain proceedings because there is not a total forfeiture but the landlord is still allowed to collect the old rent from the old tenant and so is fully compensated. If such reasoning is sound, the coal operators are fully compensated because the mines themselves have not been taken away from them. If a new lease for \$100 a month is abrogated by statute, is the payment of \$50 a month by the old tenant to be considered adequate compensation as required by the principles of eminent domain? The excess \$50 is clearly not compensated for but forfeited for the public good. The new tenant, deprived of his expected shelter by the legislative tearing up of his contract, would certainly have some right to compensation if this were a condemnation proceeding. Eminent domain merely turns property rights into money, without loss to the owner. The police power compels the property-owner to spend money or to forego profits or benefits, in other words, to suffer a loss, because the public safety and welfare require it. No split-

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ting of technical hairs can show that the rent cases are based on eminent domain proceedings or principles. They rest squarely upon the police power and there alone.

It is true the rent laws were labeled "emergency" and were for a limited time only. But this was because their subject matter—the housing shortage—might reasonably be expected to disappear in a short while. As long as the reason for them continued, they could be renewed indefinitely. To paraphrase an ancient maxim: While the reason continues, the law continues.

A statute forbidding blasting near the dam of a reservoir need not be limited to a year or two or any other "emergency period," unless indeed it be said that that kind of an emergency is a continuing one that arises whenever the forbidden act is threatened.

Counsel for the plaintiff-in-error in their printed brief filed with the Supreme Court of Pennsylvania, in discussing the applicability of the principles of the Federal rent cases to the case at bar, made the following assertion, which we believe to be well founded and to be at least as pertinent now as upon the former argument:

"We call the court's attention to the fact that the Justices who constitute a majority in those (rent) cases have sanctioned a consider-

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ably wider latitude of power to the states in regulating the business activities of their citizens to one another than the opinions of this (Pennsylvania) court would indicate would be permitted under the Pennsylvania Constitution."

Neither the rent laws nor the laws governing barrier pillars, women's hours of labor, nor hundreds of other valid police power regulations that might be cited can approach in the necessity for their existence the present mine cave laws. The former touch upon some phase of life only, but if the latter are invalidated so that the waivers are fully and literally availed of we are likely to follow the cities of the past into oblivion.

Our opponents have not spared harsh language in their attacks on those favorable to this legislation. Whatever the shortcomings of the people of Scranton they have at least sought relief from their troubles through the channels provided by our constitutions and laws. On less provocation than ours, mine wars have raged and machine guns have swept the countryside in some sections of the United States but all counsels of violence have been and we believe always will be sternly suppressed by public opinion in our community.

The plaintiff-in-error would convict the legislature of fraud in passing the bill and the Governor of fraud in signing it, for unless it appears that

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the Act is a fraudulent confiscation of property under the pretense of an exercise of the police power, its case must fall. If the preamble of the Act is false, if the Governor's statement is false, the courts are not concluded, but surely there must be some proof of this falsity, some presumption in favor of solemn official declarations. Surely if the preamble and the statements of Governor Sproul are true, no clearer case can be imagined for the proper exercise of the police power. And no attempt has been made to prove that the statements and the preamble were false. No evidence was offered on the point. Counsel for the Coal Company seem to have the idea that no proof was necessary but that statements of this kind, derogatory to their clients' methods of business, must be considered so inherently false that the courts should take judicial notice thereof even though the statements are made on the authority of the supreme legislative and executive branches of the government of one of the most conservative states in the Union and have now been given the stamp of approval by the highest judicial body of that state.

The good faith of the state authorities needs no defense at our hands. It may be noted moreover that the Kohler Act was not passed in a hasty manner nor without very full and careful consideration by the legislature. That no apologies are needed as to "the method by which the votes for its passage were actually secured" may be shown by

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the fact that the bill was passed unanimously in both houses of the General Assembly. The case for the law was so conclusively proved that all the lobbyists of the anthracite operators were unable to muster a single adverse vote. We are taking the liberty of submitting to the court as exhibits, under separate cover, exact copies of the photographic representations of conditions in the mine cave areas which were placed in the hands of every representative and senator during the hearings on the bill. The truth of these photographs has never been challenged and as they are merely characteristic scenes and depict only a few of the hundreds of subsidences, it will be seen that the declarations in the preamble are based on something more than a dishonest intent to cover up confiscatory regulation of property by declaring the public to be in jeopardy when in fact the safety of the people was in no way endangered.

VII. The Bearing of the Fowler Act and the
Dissenting Opinion.

At the very beginning of the dissenting opinion Justice Kephart apparently admits the existence of the evils charged in the preamble of the Kohler Law. Nevertheless he has some harsh things to say about the "deception of those who wrote the Act" and who apparently are trying to steal the operators' coal without paying for it. His Honor seems to feel that having paid for the privilege of

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destroying their neighbors' homes they should be allowed to get their money's worth without interference or intervention on behalf of any improvident victims and that any attempt to restrain the literal enforcement of these waivers (and many of them cover personal injuries) is lacking in common honesty. He accordingly suggests two remedies:

(1) By a constitutional amendment, compensate the mine owners for the restraints put upon them and **pay this compensation by a tax on themselves exclusively.**

(2) Require mine owners to give notice to vacate to the surface dwellers which would protect "all except those who being at full age and sound mind, voluntarily go where they have no right to be in safety."

As to the first proposition, it is difficult to see wherein if actually put into effect, it would be less objectionable to the operators than the Kohler Law or any more in conformity with the Federal Constitution. If, as our friends on the other side claim, the present law is a subterfuge to use the police power as an excuse for confiscation, then it would be equally fraudulent to use the taxing power for the same purpose. The chief virtue of such a scheme in our opponents' eyes would be the opportunity for delay and a return to unrestricted

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and ruthless mining. If it takes a generation of appeal to Harrisburg to secure passage of a simple statute, how long will it take to pass a constitutional amendment?

As to Justice Kephart's second suggestion, it would, of course, be quite simple to serve notice upon the entire City of Scranton to pick up and move out of the coal region as the Greeks have been ordered to leave Adrianople, but as we have no place to go and dislike to become refugees, most of us would probably have to stay and thereby be put beyond the pale of the law's protection.

It was this very condition of the law of Pennsylvania as developed by the courts and put into practice by the operators that led to the Kohler Law. In a famous case in the Supreme Court of Pennsylvania, a woman who owned a property held under one of the so-called cutthroat waiver deeds, refused to vacate the premises upon demand by the mining company. Polite offers to pay certain expenses if she would abandon her fireside to destruction failed to move her, so explosives were resorted to. One of the company's employees came to her door and demanded, "Get out or we'll blow you to pieces." Still failing to comply, the house was blown up fifteen minutes later and she was severely injured. In line with Justice Kephart's present opinion, the Company was absolved from any wrong.

Kirwin vs. D., L. & W. (No. 2) 249 Pa. State Rep. 102.

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As to the Fowler Act, which the dissenting opinion so severely criticises, it is respectfully submitted that there is nothing in the Act of which the Legislature or the Governor need be ashamed, and we trust that the court may examine it fully. It differs from Justice Kephart's proposal to compensate coal owners by a tax on their coal in that in the Fowler Act it is optional with the coal owners whether or not they will come under its chief provisions. They need pay nothing unless they wish, and as one of the largest companies expressed it in a public announcement, "We will not accept the Fowler Bill until the question of the constitutionality of the Kohler Bill is determined." Consequently none of the companies have accepted the Fowler Bill and it is practically in abeyance, awaiting the outcome of this suit.

The Fowler Bill, instead of increasing the burdens of the operators, is intended to palliate them as much as possible **wherever it can be done with due regard for the public safety.**

If it is reasonably practicable, for instance, to recover coal beneath a highway by letting down the surface to some extent and then repairing it without endangering the lives of the public, these facts can be determined by the public tribunal established by the Fowler Act. The operation can be carried out under the supervision of the Commission and the highway restored out of the funds

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voluntarily paid by the mining company. On the other hand, if conditions in a particular area are such that some large building might be in danger of a sudden collapse with severe loss of life, the Commission would naturally refuse leave to blast out the supporting pillars even though the self-interest of the mining company might lead them to desire to carry out such an operation. **The Fowler Law is as much concerned with the public safety first and foremost as the Kohler Law.** Even were it otherwise, the coal operators can hardly complain of the restrictions of the Kohler Law, merely on the ground that another statute has made it possible for them, at their own option, to be relieved of some of those restrictions in certain instances. Although the Fowler Law thus offers a means of relief by which a company may segregate any portion of its holdings where operations would be embarrassed under the Kohler Law and may continue to operate until the last pound of coal recoverable without causing grave harm has been mined, no company has seemed to have found it necessary as yet to seek such relief. All, with the exception of a half dozen operations of one company, hereafter noted, have operated without apparent difficulty under the Kohler Law. **Far from desiring, as plaintiff-in-error would have it appear, that millions of tons be left unmined, this community has a great interest in having every possible pound of coal mined that can be taken out without endangering**

Brief of Argument.

our families and destroying our city piecemeal. The desire to continue mining without embarrassment up to the very limits of safety, is the reason for the Fowler Law. While it is objectionable from the operators' standpoint in requiring a two per cent. payment and arouses the natural human antipathy against any new restraint by public authority and imposes the duty of care in carrying out the orders of that authority, we believe an examination of the Act, if it be deemed material, will disclose its inherent fairness and probable workability.

VIII. The Effect of the Kohler Act in Practice.

It was not to be expected that laws which wiped away rights of oppression which had been exercised for many years with no other restraint than the mine operator's own conscience would be accepted quietly and without attempts to discredit, invalidate or repeal. The petition to advance argument of the cause even suggested that a proper ground for haste was the desire of the plaintiff-in-error to put through "supplementary legislation" at the next session of the Legislature in case this court's decision is adverse. In the same way it has been suggested by innuendo at least that the court's action should be affected by the closing of six collieries in Scranton at a time when there is a coal shortage due to a strike. It is claimed that these collieries—only six out of the hundreds in the anthracite region—are so far worked out as to be un-

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able to operate under the Kohler Law and that therefore the law is unworkable. While Scranton wants these collieries opened and suffers from their closing, even were this permanent it would be a small price to pay for the preservation of the city from destruction by mines, all of which would be exhausted here in any event in fifteen or twenty years. However, there seems to be ample evidence that the closing of the mines is only a strategic move, a bit of propaganda for repeal, that has nothing to do with the workability of the laws. The collieries can be opened at any time without fear of prosecution if the Glen Alden Coal Company is willing to submit to the jurisdiction of the State Mine Cave Commission under the terms of the Fowler Act. But even this is not necessary. These same mines were closed when the mine laws went into effect but after six weeks of idleness, at a time when demand for coal was slack and after a primary election had taken place and sets of resolutions calling for the repeal of both the Kohler and Fowler Laws had been extorted from their workmen, duly signed and filed away in the company's safe, the collieries now idle were reopened and worked all winter until the miners' strike of this year. When the strike was over these mines did not reopen and the company is evidently prepared to sacrifice its miners by locking them out to furnish ammunition for its next legislative campaign or to impress this court with the need for

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quick relief. If the six idle collieries could operate all of last winter under the Kohler Law with careful mining and without complaint from any source, no legitimate reason appears why they cannot do the same this winter.

With the exception of these Glen Alden collieries all of the mines of the anthracite region appear to be working to the full capacity which their supply of cars will permit, and while consumers' coal bins may be short this winter due to the long strike and transportation difficulties, the Kohler Law will have absolutely nothing to do with the shortage.

So much for the effect of the laws upon the anthracite industry. The rest of the community has undergone a profound change since the church bells announced the signing of the Acts. Real estate has boomed, vacant land is in demand for the first time since the mine cave menace became acute. Buildings are going up in great numbers and the impression that Scranton is a doomed city, formerly prevalent both at home and abroad, has been dissipated. Although the laws have been on the books scarcely more than a year the general aspect of life in Scranton and the coal fields generally has so changed that it seems as unthinkable to revert to the old conditions of unbridled license to destroy our streets, churches, schools and homes as to return to the days of African slavery.

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We certainly do not agree with the plaintiff-in-error that "supplementary legislation," meaning a repealer, "is generally conceded to be necessary." But while a repealer would put the people of the anthracite region in a desperate predicament, it would be as nothing to an adverse decision on the right of the Legislature to regulate mining practices through the police power. The repealer could itself be repealed but if the Supreme Court of the United States once establishes that the Constitution of the United States forbids Pennsylvania to interfere under the police power with the deliberate destruction of the homes and the very lives of its people by the literal enforcement of the cutthroat waiver clauses, then indeed all hope for future relief must be abandoned. No legislative body can undo that decree. The mine cave cancer will break out with renewed vigor and with hopeless impotence we must watch our city drop into ruins.

PHILIP V. MATTES,
City Solicitor,
for the City of Scranton.

FILED

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WM. R. STANSBURY

CLERK

In the
Supreme Court of the United States

October Term, 1922.
No. 549.

PENNSYLVANIA COAL COMPANY,
Plaintiff in Error.

VS.

H. J. MAHON AND MARGARET CRAIG
MAHON.

In Error to the Supreme Court of the State of
Pennsylvania.

BRIEF OF THE ATTORNEY GENERAL OF
PENNSYLVANIA AMICUS CURIAE.

GEO. ROSS HULL,
First Deputy Attorney General.

GEO. E. ALTER,
*Attorney General of the Com-
monwealth of Pennsylvania.*

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In Error to the Supreme Court of the State of
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INTRODUCTORY STATEMENT.

The Act of General Assembly of Pennsylvania approved May 27, 1921, Pamphlet Laws, page 1198, which is popularly known as the Kohler Act is entitled, "An Act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties." It was enacted by the Legislature in an effort to meet one of the most grave industrial and social problems with which the people of Pennsylvania have been confronted. The threatened dangers which it seeks to avert are the results which are likely to follow the subsidence of the surface of land whereon have been erected or laid out structures and ways where human beings are likely to live or congregate. The public policy declared by this Act so commended itself to the judgment of the Legislature that the bill was passed by unanimous vote. It was viewed by the Legislature and the Governor as a wise and necessary exercise of the police power of the State in the interest of the life, health and safety of a large portion of its people. The Supreme Court of Pennsylvania has found no particular in which it can be said to violate the provisions of the State or Federal Constitution. Because of these facts, and of the interest which the Commonwealth of Pennsylvania has in sustaining this Act, the Attorney General files this Brief.

The effect which the result of this case may have upon the private property rights of H. J. Mahon, his wife and the Pennsylvania Coal Company is not a matter of serious concern to the public.

The Commonwealth of Pennsylvania, however, has a vital interest in the life, health and safety of large numbers of its population which may be affected by the decision rendered.

It was a matter of regret to the Commonwealth that this case came before the Court upon a record which does not contain by proof or pleading many material and important facts which set forth the public interest. The pleadings were evidently framed for the purpose of securing a decision upon the constitutionality of the Kohler Act. They present to the Court, however, a set of facts which apparently involves nothing more than a dispute between two private litigants. The Supreme Court of Pennsylvania, however, very properly took a broader view. Mr. Chief Justice Moun-
sinker said (Rec. p. 70):

"The position assumed by the learned Court below raises, as the sole question for consideration, the applicability of the Kohler Act to the facts of this particular case; but the discussion of counsel representing the parties to the cause and those who were allowed to intervene at argument, including the City Solicitor and the Attorney General of the State, has taken a much wider range and calls for consideration, first of all, of the constitutionality of the Act itself, as a reasonable and valid exercise of the police power."

We find from the Brief of the Plaintiff in Error, just received, that it persists in viewing the question here as one limited only to the private pro-

perty rights of these particular parties. The reason for this attitude obviously is, that it is only by taking such narrow and limited view that any vestige of a constitutional objection to the Kohler Act may be seen.

The Act is challenged upon the grounds (1) that it impairs the obligation of a contract, (2) that it results in the taking of property without due process of law, and (3) that it denies to the Plaintiff in Error the equal protection of the laws.

It is defended upon the ground that it is (1) a bona fide, (2) reasonable and valid exercise of police power of the State.

POINTS.

I.

THE ACT IS A BONA FIDE EXERCISE OF THE POLICE POWER.

II.

THE ACT IS A VALID AND REASONABLE EXERCISE OF THE POLICE POWER.

I.

THE ACT IS A BONA FIDE EXERCISE OF THE POLICE
POWER.

The anthracite coal field of Pennsylvania lies in the Northeastern part of the State comprising the nine counties of Lackawanna, Luzerne, Carbon, Schuylkill, Northumberland, Dauphin, Susquehanna, Wayne and Columbia. An area within these counties of approximately five hundred (500) square miles is underlaid, at depths varying from zero to twenty-two hundred (2200) feet, with thick beds of coal. Upon the surface of this area there have been constructed and now exist a number of cities and boroughs within which dwell approximately one million persons who comprise one-ninth of the total population of the Commonwealth. This population exceeds that of each of seventeen of the States of the Union, and exceeds the combined population of Vermont, Delaware, Nevada and Arizona.

Mining operations in this area have been conducted for more than a century, becoming more extensive and more intensive during the last twenty years. For the greater part of this period the removal of the coal had little appreciable effect upon the surface. Mining operations were so conducted that ample support for the surface was permitted to remain in the form of pillars. This was done not only in the interest of the surface owner, but also in the interest of the mine owner

who needed support for the roof in order that the mine might be successfully operated. Upon the surface thus adequately supported cities and towns grew and prospered, highways and railroads were built, water pipes, gas mains, electric wires, conduits and sewers were laid. In most instances the land was originally owned by the coal operators, who, as they opened and developed their mines sold the surface rights to their employes for the purpose of constructing dwellings thereon. In some cases they laid out plans of building lots dedicating roads, streets and alleys to the use of the public.

In the course of time certain of the mine owners had so far exhausted the coal within their property that they were required either to cease their operations or to mine out the coal remaining in the pillars, which until that time constituted the support of the surface. At this point some of the mines were closed and others began the process of mining out the pillars, which process is commonly referred to as "second mining".

Where mining operations were suspended the underlying pillars in some cases deteriorated. Where second mining was begun the supports were weakened and there began to occur at different places throughout the anthracite region subsidences or "cave-ins" of the surface. Such disturbances of the surface necessarily resulted in damage to structures erected upon the surface, in injury to persons in the vicinity, and in damage to the mine. Although such occurrences happened intermittently for some time prior thereto, there occurred on August 29, 1909 a subsidence in the

City of Scranton which attracted considerable public attention. It was then realized that unless preventive measures were taken similar mine caves would occur with increasing frequency and with increasing injury to persons and property as time progressed. It was also realized that at least a part of the anthracite field was approaching exhaustion. The life of the Lackawanna field was estimated in 1913 at twenty years, while in the remainder of the field it was probably many times this period.

It was to the interest of the public of this and other Commonwealths where anthracite coal is used, that the coal be so mined as to permit the maximum amount of coal to be removed from the mines which might be removed without endangering the life or safety of workmen and of persons who, of necessity, were compelled to dwell in the vicinity. It was realized also that in many cases the value of the coal remaining in the pillars was greater than that of the surface structures, and that, as a matter of public economy the surface structures might have to give way to the greater public interest involved in removing the coal.

The problem which thus confronted the public, the individuals dwelling upon the surface, the owners of the surface structures, and the owners and operators of the mines was exceedingly grave and complex, involving as it did, the interest

1. Of the public in
 - a. The life, health and safety of persons living in the mining communities,
 - b. The wholesale destruction of surface property,

- c. Securing the maximum yield of coal from the mines;
- 2. Of the surface owner in his property;
- 3. Of the surface dweller in his own safety;
- 4. Of the mine owner in
 - a. His labor supply, and
 - b. Securing the maximum yield of coal from his property.

Many remedies and solutions were suggested, some of them no doubt colored by the particular point of view of the person suggesting them. The surface owner saw a correct solution in compelling the mine owner to abandon his mine leaving sufficient coal in the pillars to furnish surface support. The mine owner saw an easy solution in notifying the surface owner to abandon his improvements in order that all of the coal might be removed. Others suggested the substitute of artificial support which might at the same time protect the surface owner and permit the mine owner to reclaim all of his coal, the expense of providing such artificial support to be paid in part by the surface owner, by the mine owner and by the consumer whose increasing demands for anthracite made necessary the continued operation of the mines.

Those interested in the growth and prosperity of the communities which dwelt upon the surface realized that that prosperity and the value of the surface improvements would rapidly disappear if the mines were closed, for the reason that the greater number of the people living in these communities earned their livelihood in the mines or in pursuits connected therewith. Those interested

as mine owners and operators realized on their part that unless there were communities of workmen living near the collieries and having safe means of transportation over highways, railroads or trolleys to and from the mines, the collieries could not be profitably operated. *It seemed clear that the mines were essential to the community and the community was essential to the mines.*

The problem thus presented was called to the attention of the Legislature in 1911, which by joint resolution approved March 24, 1911, (P. L. 26), provided for the appointment by the Governor of a commission "for the purpose of investigating and reporting upon both physical conditions and legal rights in the matter of surface support where anthracite coal has been removed, or the right to remove said coal is vested in others than the owner of the surface, and for the further purpose of suggesting new legislation relative to the same." In pursuance to this joint resolution a commission was appointed by the Governor which organized June 12, 1911 and continued its investigations almost continuously from that date until March 1, 1913, when it made its report to the Governor and the General Assembly, which report is contained in the Legislative Journal of 1913, pages 5947 to 6006.

The situation then existing is clearly set forth in that report, an examination of which convinces the reader that the commission approached its task and conducted its investigation with due regard to all of the legal rights involved as well as the many conflicting interests.

The Legislature, having received and considered the report of this Commission appointed by

Governor Tener, enacted at the Session of 1913 the Act of July 26, 1913, P. L. 1439, which provided in Section 6 as follows:

"It shall be unlawful for any person, firm, association, or corporation to dig, mine, remove or carry away the coal rock, earth, or other minerals or materials forming the natural support of the surface, beneath the streets, avenues, thoroughfares, courts, alleys, places and public highways of any municipal corporation within this Commonwealth, to such an extent and in such a manner as to thereby remove the necessary adequate support of the surface against subsidence, without having first placed, built, erected and constructed sufficient adequate and permanent artificial support in place and stead thereof, to maintain, uphold and preserve the stability of the surface of said streets, avenues, thoroughfares, courts, alleys, places and public highways."

The purpose of this Act becomes apparent from a reading of this Section. The constitutionality of this Act, so far as we know has never been questioned but has been acquiesced in by all parties. At the same time a co-operative agreement was entered into, as set forth in the report of the Commission (Legislative Record of 1913, page 5951) which, it was hoped would operate to avert all danger to the public and at the same time satisfy the claims of private interests involved.

These first efforts at the solution of the problem failed, however, to avert the threat of a great catastrophe, and the matter was again brought to the attention of the Legislature in 1921 by Governor Sproul, who in his message to the Legislature, very forcibly urged them to take such measures as might secure the life, health and safety of the people in the mining communities.

The Legislature passed, and the Governor approved the Act of May 27, 1921, P. L. 1192 known as the "Fowler Act" establishing the Pennsylvania State Anthracite Mine-Cave Commission, and the Act of May 27, 1921, P. L. 1198, known as the "Kohler Act," regulating the mining of anthracite coal. The existence of an emergency which prompted the Legislature to pass these Acts by a unanimous vote is set forth in the preamble of the Kohler Act as follows:

"Whereas, the anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such manner as to remove the natural support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, stores and private dwellings, broken gas, water and sewer systems, the loss of human life, and in general so as to threaten and seriously endanger the lives and safety of large numbers of people of the Commonwealth."

The importance of the legislation as a remedial measure for the protection of the life, health and

safety of the people of the mining communities was further emphasized by the Governor who, at the time of the approval of the Acts of 1921, made the following statement:

"I regard the enactment of this mine cave legislation as a great progressive step. For half a century thoughtful people have realized that something must ultimately be done to prevent the complete desolation of the anthracite region, and for a generation the appeal to the Commonwealth to save the situation has been heard here at the capital. In Scranton, third city of our State, a fair and beautiful city which would be the metropolis were it located in any one of one-third of the states in our Union, the conditions have become especially acute and disastrous. Lives have been lost, homes, churches and schools destroyed, and an ever present peril has threatened the morale of the entire community. The same conditions will continue and spread elsewhere unless something definite and tangible is done toward putting an end to this menace.

"Wars and pestilence and misgovernment destroyed the great cities of old. Surely in these enlightened times we must not sacrifice our communities to industrial carelessness or civic neglect, nor can we, as Americans of this day and generation, allow important parts of this God favored State to revert to the wilderness

of abandon and permit splendid counties to become forsaken mining camps, unsightly and forlorn.

"There may be imperfections in this legislation and some unevenness in its plan of operation as applied to different sections, but I feel that it is a start toward a work that has been too long deferred. It has been opposed, as all of our humane enactments have been opposed, and particularly the mine safety code, the compensation acts and the laws protecting women and children. Like these, I believe this new legislation will soon justify itself, and that in a few years as a result of it we shall remove a great reproach from our twentieth century Pennsylvania."

The facts herein before set forth concerning conditions in the anthracite coal field of Pennsylvania, the nature of the problem presented, the varied interests involved and the methods heretofore proposed to meet the situation are all matters which appear from the official report of the Anthracite Mine-Cave Commission made to the Legislature in 1913, and matters of legislative history of which we believe the Court may properly take notice.

As was said by Mr. Chief Justice von Moschzisker, in this case (Rec. pp. 70-71):

"In determining whether the act is a reasonable piece of legislation within the police power, we may 'call to our aid all

those external or historical facts which are necessary for this purpose and which led to the enactment': Endlich on Interpretation of Statutes, sec. 26."

A reading of the Kohler Act involved in this appeal discloses that it is not directed to the reimbursement of surface owners for damage which may be caused either to persons or property, but is directed solely to the protection of human life. There are probably millions of dollars in surface improvements which are not reached and which were not intended to be reached by the provisions of this Act.

In view of the facts hereinbefore referred to it is apparent that the good faith of this exercise of the police power is beyond question.

Indeed it is rather surprising that anyone familiar with these facts should seriously assert, as counsel for the Plaintiff in Error assert, that the Kohler Act was the result of a conspiracy between the surface owners and the lawmaking authorities to perpetrate a fraud upon the owners of coal lands; that its primary purpose was to take from the coal owners the valuable license of dropping the surface without liability for resulting damages; to vest in the surface owners a right of support which they had bargained away; that it was designed to coerce the coal operators to accept the provisions of the Fowler Act; that its preamble was speciously adopted to "bolster up its constitutionality"; and that its "framers knew full well that it was not a police regulation and are seeking to coerce courts into holding it to be a police regulation merely by affixing to it a vivid label."

Not only is such a charge without support in the record before the Court, but the provisions of the Act itself and the history of events which led up to its enactment clearly show that it is without foundation.

The Legislative determination of the existence of a situation inimical to the public welfare which calls for an exercise of the police power, while it may be scrutinized by the Courts, is not to be set aside unless it clearly appear that such determination was not well founded.

Lawton vs. Steele, 152 U. S. 133, 140.

McLean vs. Arkansas, 211 U. S. 539, 547.

Lower Vein Coal Co. vs. Industrial Board, 255, U. S. 144, 148.

In the case of *Nolan vs. Jones*, 263 Pa. 124, Mr. Chief Justice Moschzisker said at page 128:

"When, however, a law is enacted for 'the protection of the public health' (as the present law purports to be), it must be assumed that the Legislature proceeded 'after full examination and on reasonable grounds' (*Com. vs. Pflaum*, 236 Pa. 294, 298, affirming 50 Superior Ct. 55, 61); for 'it is not a part of their (the Court's) functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions'. *Powell vs. Pa.*, 127 U. S. 678, 685."

And in *Levy Leasing Co. vs. Siegel*, 42 *Supreme Court Reporter*, 289, (285 October Term 1921), Mr. Justice Clarke said:

"If this court were disposed, as it is not, to ignore the notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all large cities of this and other countries, resulting from the cessation of building activities, incident to the war, nevertheless, *these reports* (of Joint Legislative Commission on Housing) and the very great respect which courts must give to the legislative declaration that an emergency existed, would be amply sufficient to sustain an appropriate resort to the police power for the purpose of dealing with it in the public interest." (Words within parentheses ours). (Italics ours)

II.

THE ACT IS A VALID AND REASONABLE EXERCISE OF
THE POLICE POWER.

The Kohler Act provides:

"That it shall be unlawful for any owner, * * * * so to mine anthracite coal * * * * so to cause the caving in, collapse or subsidence of * * * *,"

- (a) Places of public assemblies,
- (b) Public highways,
- (c) Facilities of public service companies,
- (d) Dwellings used as such, and places where labor is employed,
- (e) Cemeteries.

The constitutional objections urged by the Plaintiff in Error that this Act impairs the obligation of a contract contained in a deed, that it operates to take property without due process of law, and that it denies to the Plaintiff in Error the equal protection of the laws, seem to be based upon a misconception of the scope, purpose and effect of the Act.

(a)

The protection of the life, health and safety of the public in the anthracite mining communities is the primary purpose of the Act. Its interference with property rights is merely incidental.

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare." Chief Justice Shaw in *Commonwealth vs. Alger*, 7 Cush. 84, quoted by Mr. Justice Brown in *Holden vs. Hardy*, 169 U. S. 392.

Land which is underlaid with coal is a kind of property which, by reason of operations conducted upon it or by reason of contracts made with respect to it, may become a grave menace to the life, health and safety of the public.

The dangers incident to operations conducted on coal lands have been met by extensive and elaborate codes of laws regulating coal mining. The constitutionality of these laws has long since been settled. The danger to the public arising from the contracts entered into with respect to coal lands, however, was not clearly recognized until recent years.

As the law relating to coal lands developed prior to the enactment of the Kohler Act, it permitted the creation, by appropriate conveyances, of three distinct property rights or estates in lands: (1) the surface, (2) the coal and (3) the right of support; and these estates might be vested in different persons at the same time.

Graff Furnace Co. vs. Scranton Coal Co., 244 Pa. 592,

Penman vs. Jones, 256 Pa. 416,

Charnetski vs. Miners Mills Coal Mining Co., 270 Pa. 459.

Owners in fee of coal lands might part with their right to the surface, reserving to themselves the right to mine all of the coal without any obligation to support the surface and without liability for any damage resulting from its subsidence.

Such a contract was made by the Plaintiff in Error with Alexander Craig, with respect to the lands involved in this case. Where such right was reserved by the owner of the coal, and he subsequently conveyed the coal without specific conveyance of the waiver of liability, the coal only passed to his grantee, and the license to interfere with the surface without liability therefor was held to be a right, liberty, or franchise, separate both from the ownership of the surface and of the coal, which remained in the grantor and might be conveyed by him to another. *Penman vs. Jones*, 256 Pa. 416. If this right were subsequently acquired by the surface owner, it became a right of support; if acquired by the owner of the coal, it be-

came a license to let down the surface without liability for damage.

It is probable that when conveyances of surface rights were first made, the right to remove coal without liability to the surface owners was reserved merely as a safeguard against an occasional injury which might occur through first mining; and that second mining, or the removal of pillars, was not then in contemplation. However this may have been, the process of second mining with its attendant disasters to persons and property upon the surface, brought very forcibly to the attention of the public the danger created by the separation of surface rights and the right of support, which danger would continue so long as the mining of coal was unregulated.

The large extent of territory underlaid with anthracite coal, the large number of people living upon its surface, and the very obvious menace to the life, health and safety of these people, clothed these lands and these mining operations with a public interest which manifestly made them a proper subject for the exercise of the police power.

It is self evident that the subsidence of the surface of lands upon which have been constructed such structures and facilities as are mentioned in the Act is likely to be attended by injury to persons and property, and if it should occur upon an extensive scale would result in wholesale waste and destruction. Undoubtedly the police power can be constitutionally exercised to prevent the occurrence of a situation so inimical to the public welfare.

If the public welfare be threatened by the existence or the certain occurrence of a grave public

danger the legality of an exercise of the police power to prevent or to remedy cannot be questioned.

The exercise of the police power to regulate contracts relating to land has been sustained where the disaster threatened was of less serious consequence than that which is dealt with in the Act now under consideration.

In the case of *Block vs. Hirsh*, 256 U. S. 135, which involved the constitutionality of the Act of Congress regulating the letting of houses in the District of Columbia, Mr. Justice Holmes, speaking for this Court said (page 155):

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Ins Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915 C, 1189, 34 Sup. Ct. Rep. 612; irrigation, in *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; and mining, in *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. They sufficiently illustrate what hardly would be denied. They

illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest (Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co. 240 U. S. 30, 32, 60 L. ed. 507, 511, 36 Sup. Ct. Rep 234), and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See also Noble State Bank v. Haskell, 219 U. S. 104, 110, 111, 55 L. ed. 112, 116, 117, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912 A, 487."

In the case of *Levy Leasing Co. vs. Siegel*, 42 *Supreme Court Reporter* 289, (No. 285 October Term, 1921), which involved a New York statute of the same character, Mr. Justice Clarke, said:

"The warrant for this legislative resort to the police power was the conviction on the part of the State legislators that there existed in the larger cities of the State a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the State. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it cannot be doubted, for,

unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for the exercise of that power."

Elsewhere in the same opinion, after citing a number of authorities, Mr. Justice Clarke says:

"These authorities show that from time to time for a generation as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases, and in both the *Marcus Brown* (256 U. S. 170) and *Block* (256 U. S. 135) cases, it was held, in terms, that the existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them to the extent provided for in the laws in those cases objected to."

It will be urged, however, that the cases of *Marcus Brown Holding Co. vs. Feldman*, 256 U. S. 170, *Block vs. Hirsh*, 256 U. S. 135, and *Lery Leasing Co. vs. Siegel*, 42 Supreme Court Reporter 289, are not applicable to the case now under consideration, for the reason that in those cases the Acts involved were emergency laws passed to meet an urgent temporary necessity and expressly limited by their terms to a brief period. It is true that in *Block vs. Hirsh* it was said: "The regu-

lation is put and justified only as a temporary measure. * * * A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change." Ordinarily the operation of economic laws regulates the supply of houses so that dwellings for rent are not clothed with such a public interest as would subject the contracts of landlord and tenant to the regulatory exercise of the police power. The nature of the property, the rights in it and the contracts relating to it, are such that regulation of the character contained in those Acts could be justified only by the existence of extraordinary circumstances which the Legislature and the Courts knew must disappear when the emergency passed. But we do not understand the Court to mean that if a situation which threatened the public safety and welfare might be dealt with in an emergency, that it could not be controlled by appropriate regulation if that emergency continued. The sound reason which sustained the validity of those Acts during the period when the emergency was reasonably expected to continue will sustain as a permanent change an Act which is intended to meet a permanent menace to the public. Accordingly the same fundamental principles of law which sustained the rent laws during the period of emergency, will sustain the Kohler Act.

It should be noted also in considering the application of the rent cases, that the case at bar falls within a class of cases which the dissenting opinion recognized as proper for the exercise of the police power. In the dissenting opinion in

Block vs. Hirsh, 256 U. S. 135, Mr. Justice McKenna, referring to the authorities cited in the majority opinion, said (page 167) :

“* * * They justify the prohibition of the use of property to the injury of others,—a prohibition that is expressed in one of the maxims of our jurisprudence. Such use of property is, of course, within the regulating power of government. It is one of the objects of government to prevent harm by one person to another by any conduct.”

The Kohler Act is in line with numerous familiar cases wherein legislation involving the exercise of the police power has been sustained. The well established restriction placed upon the right of public service companies to fix rates by contract, the power to forbid absolutely the sale of oleomargarine for the purpose of preventing possible frauds, the power to prevent the sale of unwholesome meats and other foods, the power to regulate or prohibit the manufacture of corn and rye into whiskey, the power to forbid mining to the boundary of a mine property without leaving a barrier pillar of sufficient thickness to prevent possible injury from the flooding of an adjoining mine, are familiar illustrations of the exercise of the police power enacted to avoid dangers which are neither so grave nor so certain as those which the Kohler Act seeks to prevent.

In its application to all coal lands where the right of surface support is still vested in the surface owner, the effect of the Kohler Act is to pre-

vent the making of any valid contract whereby the right of support may be separated from the surface ownership in such manner as to permit the subsidence of any of the structures or facilities mentioned in the Act. It must be remembered that there is a broad field in which the Kohler Act does thus operate. It appears from the report of the Anthracite Mine Cave Commission already referred to that in 1912 in the City of Wilkes-Barre, out of a total of 3,077 acres of coal land underlying the city, 577 acres were held by owners of the coal without obligation to support the surface but the remaining 2500 acres were so held that the surface must be supported. In other parts of the coal fields the relative proportions of land held in one way or the other may vary.

If the circumstances which now exist in the anthracite regions could have been foreseen and certainly predicted by the Legislature a half century ago, it would clearly have been within its power to limit the owner's right to contract, by the enactment of such a regulatory measure as the Kohler Act. And we are confident that if it were not for the existence of contracts already entered into, the constitutionality of this Act would not have been questioned.

The present case, however, involves a piece of land in which the right of support had, at the time of the approval of the Kohler Act, already been separated from the surface ownership and vested in the owner of the coal. Here the effect of the Act is to prevent the owner of the coal from exercising his right to drop the surface on which structures of a certain character have been erect-

ed. It is the operation of the act upon such a state of facts which brings this case before the Court.

Counsel for the Plaintiff in Error, in urging upon the lower courts their constitutional objections to the Kohler Act have considered it only in its application to cases such as the one presented in the pleadings. In so doing they have placed undue emphasis upon the effect which it will have upon the property rights of the Pennsylvania Coal Company, and have failed to view it in its proper perspective.

It is an act, prospective in its operation, regulating the future conduct of mining for anthracite coal. It operates generally upon all mines, including those now being operated and all which may be opened and operated in the future. It operates without regard to any private contracts which may have been made relating to surface support. It operates alike upon lands where the surface owner still has the right of support, and upon those where the right of support has been separated from ownership of the surface and is held by the owner of the coal or by a third person.

But if the Act in its operation upon lands where the right of support and the ownership of the surface have not been separated, be a constitutional exercise of the police power, it is equally valid in its operation upon lands where these interests are held by different persons.

Persons cannot remove their property from the reach of the police power by entering into contracts with respect to it. In the case of *Marcus Brown Holding Company vs. Feldman*, 256 U. S. 170, where it was so strenuously urged that the

New York rent laws impaired the obligation of existing contracts, Mr. Justice Holmes, said (page 198) :

“* * * In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession, and of the new lease, which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the state when otherwise justified, as we have held this to be. *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274, 278, 26 Sup. Ct. Rep. 127; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 482, 55 L. ed. 297, 303, 34 L. R. A. (N. S.) 671, 31 Sup. Ct. Rep. 265; *Chicago & A. R. Co. v. Tranbarger*, 238 U. S. 67, 76, 77, 59 L. ed. 1204, 1210, 1211, 35 Sup. Ct. Rep. 678; *Union Dry Goods Co. v. Georgia Pub. Service Corp.* 248 U. S. 372, 375, 63 L. ed. 309, 311, 9 A. L. R. 1420, P. U. R. 1919 C, 60, 39 Sup. Ct. Rep. 117; *Producers' Transp. Co. v. Railroad Commission*, 251 U. S. 228, 232, 64 L. ed. 239, 242, P. U. R. 1920 C, 574, 40 Sup. Ct. Rep. 131.”

All property within the state is held, and all contracts are entered into subject to the future exercise of the police power of the state. So long as this power was not exercised owners of coal lands were free to bargain with them as they chose. Contracts reserving to the owner a license to let

down the surface were recognized and sustained by the courts because the parties had stipulated. There is no criticism to be made of the decisions of this Court in *Commonwealth vs. Clearview Coal Co.* 256 Pa. 328, and *Penman vs. Jones*, 256 Pa. 416. But every such agreement was entered into by the parties with full knowledge that whenever the existence of such contracts and the exercise of the license reserved should threaten the life, health or safety of the people, the Commonwealth in its sovereign power might interpose and restrict the use of those contract rights to such extent as might be necessary in the public interest. Owners of coal lands, who saw highways being laid out and improved, railroads and trolley lines built, sewers and gas mains laid, light, telephone and power wires stretched overhead, depots, stores, theatres, hotels and dwellings constructed, and who, perhaps as many of the coal companies did, laid out the surface in building lots dedicating streets and alleys to public use, selling the lots for the purpose of having dwellings erected thereon, such owners were bound to know that whenever the time should come when the exercise of the license which they had reserved would threaten the welfare of the communities upon the surface, the police power of the State might be interposed to restrict their rights.

There are two Pennsylvania cases in which this principle has been clearly set forth. In *Scranton vs. Public Service Commission*, 268 Pa. 192, Mr. Chief Justice Brown, in referring to the operation of the police power upon a franchise contract entered into by the City of Scranton, said at page 196:

"When the City of Scranton gave its consent to the construction of what is now the Scranton railway, it exercised a constitutional power conferred upon it, but it is conclusively presumed to have known at the time the consenting ordinance was passed that the sovereign police power of the State to modify its terms would be supreme whenever the general well-being of the public so required. In exercising the power given it by section 9 of article XVII of the Constitution, the city did so with section 3 of article XVI before it, giving it distinct notice that the police power of the Commonwealth was, and would be, controlling. With this knowledge on the part of the municipality at the time it passed the ordinance, it is not now to be heard to complain that the State has struck down its contract or agreement with the street passenger railway company. The State has done nothing of the sort, but has merely enforced a condition written by the law into the ordinance at the time of its passage, that it would at all times be subject to the police power of the Commonwealth."

And in *Relief Electric Light, Heat, & Power Company's Petition*, 63 Penna. Superior Court Reports 1, the court said (page 8):

"Generally as to the scope and effect of the power, when once exercised, for legitimate reasons, it has been establish-

ed by the courts that the inhibition of the Federal Constitution upon the impairment of contract obligations, or deprivation of property without due process of law, or equal protection of the laws by the states, is not violated by the legitimate exercise of this legislative power of police regulation: *Penn. R. R. Co. v. Dwing*, 241 Pa. 581. 'The governmental power of self-protection cannot be bargained away, nor can the exercise of the rights granted nor the use of property be withdrawn from the implied liability to governmental regulation.' *Norfolk & Western P. R. Co. v. Dulack*, 208 U. S. 522-523. 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the liability of the subject-matter.' *Knoxville Water Co. v. Knoxville*, 139 U. S. 498; *Hudson County Water Co. v. McCarter*, 209 U. S. 329. Uncompensated abridgment to a regulation enacted for the public welfare or safety under the police power of the State, is not a taking of property without due compensation or process of law: *New Orleans Gas Company v. Madison Gas Co.*, 197 U. S. 455.

'Property right, as such, is then no barrier to the reasonable exercise of the police power, as illustrated by the *Chenierette* and *Prohibition* cases. Where the

destruction is a mere incident to the enforcement of the law enacted in the interest of health, morals and safety, &c., it is not the destruction of property rights that courts must guard against, but whether the law does conserve and protect the public welfare, and whether that public welfare is of such consequence as to demand the imposition of this the most powerful of governmental prerogatives."

The cases of *Russell vs. Sebastian*, 233 U. S. 195, and *New Orleans Gas Light Co. vs. Louisiana Light & Heat Producing Manufacturing Co.*, 115 U. S. 650, relied upon by the Plaintiff in Error in the court below, and by Mr. Justice Kephart in his dissenting opinion (Rec. p. 81), are not in conflict with this principle. No exercise of the police power was involved in thoses cases, and in the *New Orleans Gas Light Co. case* this Court recognized the principle which we have stated above when it said at page 672:

"The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals or the public safety, as the one or the other may be involved in the execution of such contracts."

(b)

The Act does not take the property of the Plaintiff in Error.

Counsel for the Plaintiff in Error in their paper book filed in the State Court repeatedly insisted that the Kohler Act operates to take the Coal in pillars from the mine owner and convey it to the surface owner.

If it did so, it would do no more than was done by Section 10 of Article III of the Anthracite Mining Act of June 2, 1891, P. L. 176, which provided that:

"It shall be obligatory on the owners of adjoining coal properties to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property, etc."

That Act was sustained by the Supreme Court of Pennsylvania in *Commonwealth vs. Plymouth Coal Co.*, 232 Pa. 141, and this Court in *Plymouth Coal Co. vs. Pennsylvania*, 232 U. S. 531, against precisely the same constitutional objections now urged, and would seem to be conclusive against the contentions of the Plaintiff in Error.

But the Act in question here does not go as far as the Barrier Pillar Act. It contains no provision requiring any mine owner to leave coal in place. It merely requires the operator to so regulate his mining that he shall not cause a subsidence of the surface. If natural support other than coal in the pillars be available, or if artificial support be provided, every pound of coal may be re-

moved from the mines. Slushing of the mines is but one of the processes by which artificial support may be provided, and this process was begun by the Delaware and Hudson Company as long ago as 1890. To what extent it has been effective and whether it be applicable to conditions in all mines, we do not know. But we call attention to the fact that the Kohler Act does not require the leaving of any coal in the pillars. If such be its effect, as the Plaintiff in Error claims, it is because of facts and circumstances which do not appear either by proof or pleadings in the record before the Court, and which the Plaintiff in Error should have spread upon the record if deemed material to a decision of the case. In the absence of conclusive proof of the existence of such facts, the Act must be judged by its terms, which do not require the leaving of coal in the pillars.

Nor does it transfer the right of support from the owner of the coal to the surface owner. This right, license or estate in the land is nothing more than an immunity from civil liability for damages to the surface owner. Under the Kohler Act, this immunity continues.

If the Act were designed, as the Plaintiff in Error contends, for the protection of the property rights of the surface owners, and not as a bona fide and reasonable exercise of the police power, it would contain two features which are conspicuously absent from it.

First—it would provide that the liability of the defendant for damages to the person or property of the plaintiffs which was released by the contract contained in the deed, should be restored.

Second—it would apply generally to all valuable structures upon the surface.

A reading of the Act discloses, however, that the immunity of the mine operator from civil liability to the surface owner, is not impaired or in any wise affected by the Act; and the structures and facilities which are protected are only those whose subsidence is likely to result in loss of life or injury to the person.

(c)

Notice to the surface owner to vacate his property is not sufficient to prevent injury to him or to the public.

The Plaintiff in Error insists that the Act is not a reasonable exercise of the police power for the reason that the threatened injury to the surface dweller and the public may be averted in another way, which will not result in impairing the obligation of its contract or in taking its property. It is suggested that notice may be given to the surface owner or occupant to vacate his dwelling, and in this manner the danger may be averted. This is equivalent to saying "You are living in a place which has now become dangerous. If you continue to live there you assume the risk of any consequences which may follow."

This same objection might have been made to the reasonableness of all of the legislation which has been enacted for the protection of persons employed in mines. It could be urged with equal force that all such regulations are unreasonable because the dangers may be averted by merely serving notice upon the employe that mining is a dangerous occupation, that noxious gases, foul air, explosions, cave-ins, etc., are likely to be encountered, and if the employe insists upon working after such notice, he assumes the risk. Such regulations, however, have invariably been sustained, on the theory that there is a virtual necessity for the miner to assume the risk. Men must work in the mines, and it is a matter of concern to the public that they be permitted to work there under safe and healthful conditions.

There is the same virtual necessity for the existence of communities upon the surface. Communities must exist in or near the vicinity of the mines or they cannot be operated, and it is a matter of concern to the public that persons be permitted to dwell there in safety. The anthracite of Pennsylvania lies in beds of varying width stretched beneath the valleys and mountains of the coal regions. Even if it were possible to remove whole cities from their present locations, and reconstruct them upon sites beyond the coal measures, those sites may be so distant from the mines and so separated by the topography of the country that access to and from the collieries would be impracticable and the mines would close for want of labor. Moreover cities are built where nature affords an opportunity for them. Industrial communities cannot be perched upon the mountains or in places inaccessible to roads and railroads. The public convenience and necessity for the existence of the communities in the immediate vicinity of the mines seems to be demonstrated by the fact that of the 93 square miles of coal lands in Lackawanna County, 66 square miles lie underneath incorporated boroughs and cities, and out of 83 square miles in Luzerne County, 35 square miles are below the boroughs and cities. Theoretically it may be possible to serve notice upon a city to vacate and move elsewhere. Practically it is not. Nor is it always practicable or possible for the individual dweller upon the surface to find another house in which to live. Throughout the Commonwealth of Pennsylvania and elsewhere in this and foreign countries there is an acute shortage of

houses due to conditions prevailing during the war, and there is no doubt that this condition, which has elsewhere proven so serious as to give rise to the legislation reviewed in the Rent Cases (already cited), has been aggravated in the coal mining communities by reason of the very conditions which gave rise to the Kohler Act.

Or it may be that the occupants of the dwelling will recklessly disregard the notice given and take the chance of escaping injury. The notice will not avail to prevent the disastrous results of his necessity or folly. "The State still retains an interest in his welfare however reckless he may be. The whole is no greater than the sum of all its parts, and when the individual health, safety and welfare are sacrificed, the State must suffer." (*Commonwealth vs. Plymouth Coal Co.*, 232 Pa. 141 at p. 146).

The only practicable way in which the life, health and safety of the public in these communities may be adequately safeguarded is by the enforcement of such restrictions as are contained in the Kohler Act, and for this reason those restrictions are reasonable even though they limit to some extent the rights of others.

Summary.

As we have already observed, anthracite coal lands have been clothed with a public interest by reason of the nature of the operations which are conducted therein, the estates which may be created in them, the large area of land involved, the large number of persons living thereon and the industrial necessity for the continued existence of the communities which have grown up in the coal regions. Recognizing this interest the Legislature for the protection of the public welfare enacted the Kohler Act.

In cases where the ownership of the surface and the right of support have not been separated, this act operates to prevent the making of any valid contract whereby the right of support may be separated from the surface ownership in such manner as to permit mining which will cause the subsidence of (a) Places of public assemblage, (b) Public highways, (c) Facilities of public service companies, (d) Dwellings used as such, and places where labor is employed, and (e) Cemeteries. Such limitation upon the rights of the owners of coal lands is clearly constitutional. In its operation upon lands where the surface ownership and the right of support have been separated, it operates to restrict the free exercise by the coal owner of his license to drop the surface. But such rights were acquired subject to the power of the state to regulate their use, whenever it became necessary to do so in the interest of the public.

The Act does not require the mine owner to leave any coal in place, it does not affect the civil liabilities of the surface and mineral owners, nor

protect surface property generally, but regulates the mining of coal in a manner reasonably required for the protection of the life, health and safety of the public.

Accordingly it does not in any unconstitutional manner affect the rights of the owners of coal by impairing the obligation of their contracts, by taking their property without due process of law or by denying to them the equal protection of the laws.

GEO. ROSS HULL,

First Deputy Attorney General.

GEO. E. ALTER,

Attorney General of the Commonwealth of Pennsylvania.

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IN THE
Supreme Court of the United States

No. 549 October Term, 1922

PENNSYLVANIA COAL COMPANY,
Plaintiff-in-Error,

vs.

H. J. MAHON and MARGARET MAHON,
Defendants-in-Error

**BRIEF ON BEHALF OF SCRANTON GAS AND
WATER COMPANY, Intervening Defendants
in Error**

STATEMENT

This brief is submitted by leave of Court upon petition filed on behalf of the Scranton Gas and Water Company, a public service corporation, serving the public in the City of Scranton and neighboring communities in the anthracite mining district in Lackawanna County, Pennsylvania.

The interest of the Scranton Gas and Water Company in this case arises from the vital importance of the questions involved, not only to its own property rights, but to the property and lives of the community which it serves. The facts in the case, as presented upon the face of the record, appear in the Bill and Answer (pp. of Transcript of Record). The facts upon which a proper decision may be arrived at are of such universal knowledge that no apology is needed for our suggestion that they are properly the subject of judicial notice without any proofs.

Argument—Introduction

ARGUMENT

Introduction

This case may be resolved into two main questions:

First, is the Kohler Act, approved May 27, 1921, P. L. 1198, a reasonable exercise of the police power?

Second, is it a valid exercise of the police power?

We may properly start with Lord Coke's rule, "What was the mischief or defect for which the law had not provided?"

In commenting upon this rule, we find it stated that

"In order to understand the subject matter and the scope and object of the enactment" we may and must "call to our aid all those external or historical facts which are necessary for this purpose and which led to the enactment."

Endlich Interp. of Stts. Sect. 29.

In construing statutes based upon the police power, cognizance must be taken of matters of public knowledge, notoriety and history in order to determine whether a mischief or evil existed, and to what extent it affected injuriously the public welfare.

The history of the disastrous results, not alone to property, but to the safety and lives of the public, arising from the mining methods in vogue in the anthracite regions of Pennsylvania is well known throughout the State, and even to some members of this Court, and judicial notice may and should be taken thereof. The other paper books in the case specify the facts in detail. We need only refer to the Plymouth Mine and the Oxford Mine incidents, and to the photographs here exhibited.

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The conditions have been the subject of discussion in the Legislature for years; of consideration by the Commission on Constitutional Revision and of a specific remedy suggested by them; of a message by the Governor to the Legislature recommending some form of relief, and of a forceful declaration by him upon his approval of the Act.

The preamble to the Kohler Bill as introduced in the Legislature read as follows:

"Whereas the anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such manner as to remove the natural support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, stores and private dwellings, broken gas, water and sewer systems, the loss of human life, and in general so as to threaten and seriously endanger the lives and safety of large numbers of the people of the Commonwealth; therefore, etc."

Having this concise statement of existing conditions before them, the Legislature might well have said:

"Therefore we, the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, deem it our right and duty to protect the lives and safety of the public by the passage of legislation regulating the mining of anthracite coal, prescribing duties for certain municipal officers, and imposing penalties."

The facts recited in the foregoing preamble instead of being a "vivid label" are a mild statement of conditions that have become notorious in the anthracite regions, and clearly call for the exercise of the fundamental police pow-

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ers of the State which have their source in the legal maxim
sic utere tuo ut alienum non laedas.

Munn vs. Illinois, 94 U. S. 113; 24 L. Ed. 77,
83-84.

This maxim, and its congener, *salus populi suprema lex*, have been applied by all of our Courts, both State and Federal, in so many and so varied cases that it would be to us a weariness of the flesh, and a tax upon the patience of this Court to attempt their enumeration.

That the exercise of the police power when the lives, health and safety of the public are involved does not offend against the constitutional provisions securing "due process of law," forbidding the "impairment of the obligation of contracts," or securing to all "equal privileges" and "the equal protection of the laws," will be shown later.

**I. IS THE ACT A REASONABLE EXERCISE OF
THE POLICE POWER?**

Legislation controlling methods of anthracite mining is not new in Pennsylvania and has usually required the construction of the Courts before it has been accepted.

The earliest case that we have found is

Commonwealth ex rel Williams vs. Bonnell, 8
Phila. 534.

This case arose in the common pleas of Luzerne County, and the opinion is by Judge Harding, delivered July 3, 1871. It was an attack on what was then known as the "Coal Mine Ventilation Law," entitled "An act providing for the health and safety of persons employed in coal mines," approved March 3, 1870, P. L. 3. We believe this to have been the first general statute in Pennsylvania

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seeking to control the methods or manner of mining coal, and it was passed exclusively for the protection of the employees in such mines.

In this case the chief dispute was with respect to Section 3 of the act of 1870, which provided as follows:

"That four months from and after the passage of this act, it shall not be lawful for the owner or agent of any anthracite coal mine or colliery, worked by or through a shaft or slope, to employ any person in working within such coal mine or colliery, or to permit any person to be in such coal mine or colliery, for the purpose of working therein, unless there are in communication with every seam or stratum of coal work in such coal mine or colliery, for the time being at work, at least two shafts, or slopes, or outlets, separated by natural strata, of not less than one hundred and fifty feet in breadth, by which shafts, slopes or outlets distinct means of ingress and egress are always available to the persons employed in the coal mine or colliery."

This section also provided that it shall not apply to opening a new mine, nor to any working for the purpose of making a communication between two or more shafts, etc., so long as not more than twenty persons are employed at any one time in said new mine or working.

Section 5 of the act gave authority to courts of law to prohibit by injunction the working of any mine in contravention of the act.

A bill was filed to enjoin the defendant from working his mine until he had driven a second opening, as required by the act. The defendant denied the constitutionality of the statute, and the opinion of Judge Harding marks a path in the line of the legislation we have under discus-

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sion here. He held the act to be constitutional, and his vigorous language is worthy of citation. He refers to the contention of the defendant that a great loss will be sustained throughout the entire coal region by the enforcement of this statute (p. 536):

“Millions of capital, it is urged, invested here in good faith under former laws, must remain unproductive for months, and thousands of laborers must suffer in idleness, with hunger and want across their very hearthstones already, if the sole attention of operators must be given to strict compliance with the said Act.”

Judge Harding then says (p. 536):

“If the Commonwealth of Pennsylvania, through her legislature, can police our towns and cities, why may she not police the coal mines within her borders? If through her legislature she can attach conditions, rules and regulations, which are to be observed by her citizens in the use of their own peculiar property, what is there about coal mines, or the owners thereof, that should specially exempt them from her supervision and control? If she recognizes, almost as a part of her organic law, applicable to the property of her citizens, the rule, long ago grown into a maxim, *sic utere tuo ut alium non laedas*, why may she not make it equally applicable to the lives of her citizens? The Act, as we view it, is nothing more nor less than a mandate to the operators of coal mines, that they shall so work them as not to injure the health, nor endanger the lives of persons employed in and about them. Of its constitutionality we have not the slightest doubt. It stands upon the statute book, known of all men, as the offspring of ‘Avondale.’ Of its propriety and its necessity the law-making power was taught not a moment too

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early. And we may say, now, that had its provisions been faithfully observed by the operators, or stringently enforced by the officer whom it called into existence, there would have been in all human probability, twenty more living, industrious, producing human beings, and fifty less widows and orphans in 'West Pittston' than there are to-day."

We need not follow this case further, but it is a clear exposition of the propriety of the act and its entire reasonableness. It apparently did not go further, but it has been cited both in the Supreme Court of the United States and in the Pennsylvania Supreme Court.

Holden vs. Hardy, 169 U. S. 366, 395; 42 L. Ed. 780, 792;

Comth. vs. Plymouth Coal Co., 232 Pa. 141, 147.

In passing we may well inquire whether it would, in this day, be considered unreasonable to require two shafts or openings for each mine, and whether the protection of the lives of employees in the mines is any more a reasonable exercise of the police power than the protection of the public in passing over highways and streets, or occupying or being in buildings, private or public, over the surface of anthracite mines.

We come now to a late and important case, which is, in our opinion, controlling in the question now under discussion.

Comth. vs. Plymouth Coal Co., 232 Pa. 141;

Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 531; 58 L. Ed. 713.

This case began in the common pleas of Luzerne County, and from the decree there entered an appeal was taken to the Supreme Court of Pennsylvania, and from that court the case went up, on writ of error, to the Supreme Court of the United States.

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The anthracite mining act of June 2, 1891, P. L. 176, shows by its title that it was a clear exercise of the police power, viz:

“An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith.”

By Section 10 of this act the owners of adjoining coal properties were required to leave pillars of coal along the line of an adjoining property, to form a sufficient barrier for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water.

A bill was filed in Luzerne County to enjoin the Plymouth Coal Company from working its mines until it had complied with this statute in a specific manner. The defendant's answer denied the constitutionality of this section of the statute, upon the ground that thereby there was a violation of Section 10 of Article I of the Constitution of Pennsylvania, which provides that private property shall not be taken for public use without authority of law and without just compensation, and of the Fourteenth Amendment to the Federal constitution, which provides that no state shall deprive any person of life, liberty or property, without due process of law.

This contention was denied by Judge Ferris, who sustained the bill and granted the injunction therein prayed for. As his opinion was adopted by our Supreme Court it is proper to make some extracts therefrom:

(P. 145).

“The police power of the state is difficult of definition, but it has been held by the courts to be the right to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community, which does not encroach

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on a like power vested in congress or state legislatures by the federal constitution, or does not violate the provisions of the organic law; and it has been expressly held that the fourteenth amendment to the federal constitution was not designed to interfere with the exercise of that power by the state. Its essential quality as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large. The principle that no person shall be deprived of life, liberty or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment, and it has never been regarded as incompatible with the principle, equally vital, because equally essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owners' use of it shall not be injurious to the community."

(P. 149):

"The police power, founded as it is on the maxim 'sic utere tuo ut alienum non laedas,' is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner."

(Pp. 150-151):

"The enactment here in question does not authorize a taking of property for public use, is not an exercise of the right of eminent domain, and, therefore, is not unconstitutional because of failure to provide for compensation; but it regulates the use of tangible property—the coal in the pillar—by requiring the owner to use it (negatively by leaving it unmined) as not to injure the rights of others, or, in another aspect of the case, does not affect tangible property

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at all, but destroys an intangible property right (that of mining out the pillar coal) in the interest of the public safety. In either case it is, in our opinion, an exercise of the police power, justified by the circumstances, and not violative of either the state or the federal constitution."

An appeal to the Supreme Court of the State having been taken the decree of the lower court was affirmed, and a writ of error granted by the Supreme Court of the United States resulted in an affirmance there. We quote from the opinion of Mr. Justice Pitney, using the pages of the Law Edition: 58 L. Ed. 717:

"That the business of mining coal is attended with dangers that render it the proper subject of regulation by the states in the exercise of the police power is entirely settled. *Holden vs. Hardy*, 169 U. S. 366, 393, 42 L. Ed. 780, 791; *Consolidated Coal Co. vs. Illinois*, 185 U. S. 203, 207, 46 L. Ed. 872, 875; *Barrett vs. Indiana*, 229 U. S. 26, 29, 57 L. Ed. 1050, 1052.

"Legislation requiring the owners of adjoining coal properties to cause boundary pillars of coal to be left of sufficient width to safeguard the employees of either mine in case the other should be abandoned and allowed to fill with water cannot be deemed an unreasonable exercise of the power."

Answering an objection to the statute that the width of the barrier pillar is left uncertain, and that the statute lacks uniformity, owing to the membership of the statutory tribunal, it was said, after referring to the fact that the statute could not define the width of the pillar, and required its determination by reference to the situation of the particular property (pp. 718-719):

"Administrative bodies with authority not essentially different are a recognized government insti-

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tution. Commissions for the regulation of public service corporations are a familiar instance. And it has become entirely settled that powers and discretion of this character may be delegated to administrative bodies, or even to a single individual."

Many criticisms of the act were presented, attempting to show that it was not a reasonable exercise of the police power. Many reasons, no doubt similar in principle, if not in fact, to those which were then suggested are now urged against the act of 1921; but these objections were not held to render the statute of 1891 unconstitutional, and the judgment was affirmed.

It seems to us that this case is conclusive upon the question here, that if the act of 1891 was no unconstitutional, because not an unreasonable exercise of the police power, then the act of 1921 is equally defensible against an attack from that quarter.

As we have already suggested, the act of 1891 is for the preservation of the lives and property of the employees of anthracite mines; that of 1921 for the lives and safety of the public passing over or occupying the surface over anthracite mines. Is there any ground to aver that the latter is not as reasonable a ground for the exercise of the police power as the former?

Even were this a case where the court could not take judicial notice of the conditions which induced the passage of the act, yet we find that the Supreme Court of the United States has frequently sustained the right of the legislature to determine what the interests of the public require. In *Holden vs. Hardy*, 169 U. S. 366, 392; 42 L. Ed. 780, 791, (a mine law case), the court say:

"While this court has held, notably in the cases of *Davidson vs. New Orleans*, 96 U. S. 97, and *Yick Wo vs. Hopkins*, 188 U. S. 356, that the police power

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cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety or morals, or the abatement of public nuisances, and 'a large discretion' is necessarily vested in the legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests."

And in Barrett vs. Indiana, 229 U. S. 26, 29; 57 L. Ed. 1050, 1052, the court say, discussing an act designed for the protection of miners:

"The legislature is itself the judge of the means necessary and proper to that end, and only such regulations as are palpably arbitrary can be set aside, because of the requirement of due process of law under the Federal Constitution. When such regulations have a reasonable relation to the subject matter and are not arbitrary and oppressive, it is not for the court to say that they are beyond the exercise of the legitimate power of legislation."

Consider for a moment the scope and evident purpose of the Kohler act. Every clause of Section 1, (a) to (e), inclusive, is predicted primarily upon the danger to human life; not the life of an individual, but the lives of a community, of the public. Even clause (e), naming cemeteries, involves that factor, though literally it refers only to the dead.

While to protect the lives of the public it is necessary to protect property occupied or traversed or used by the public, yet the protection of property rights is only the secondary purpose of the act, because incidental to the protection of life. The act confers no protection upon personal property. —If a building be unoccupied, not "used as a human habitation" or place of gathering by the pub-

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lic, the protection of the act cannot be invoked. None of the improvements upon land, barns, gardens, orchards, are protected; only the dwelling house itself. Clause (c), relating to public utilities, stands upon the same footing as streets and highways in clause (b), namely the effect upon public health and life if their duty of serving the public be made impossible of performance by destruction of their facilities. The act seeks to protect life, limb and health; beyond that line it does not go.

To the argument adduced by the defendant that its whole duty is performed when it gives notice to the owner or owners of the surface to abandon their homes, it is sufficient answer to say that, carried to its logical conclusion, the defendant and all mine owners need only give notice to any community to abandon their homes, their schools, their churches, all conveniences of life and social and business intercourse.

But you cannot evict a community any more than you can "indict a nation." Clearly, therefore, the rights of the public are paramount to the rights of the several owners of the underlying mines.

No rent laws, as in New York and the District of Columbia, woman's hours of labor laws, previous mining laws, nor numerous other valid police power regulations rest upon as imperative a necessity as this Kohler act. The former affect only some single phase of life; this seeks to protect life itself.

To quote again from that landmark of the law of regulations, the *Munn* case, 24 L. Ed., page 84:

"When private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1

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Harg L. Tr. 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large."

This criterion "affected with a public interest" has been adopted as both the solvent and the touchstone of many subsequent cases involving the exercise of the police power; a few of which are:

German Alliance Ins. Co., vs. Lewis, 233 U. S. 389; 58 L. Ed. 1011.

Clark vs. Nash, 198 U. S. 361; 49 L. Ed. 1085.

Strickley vs. Highland Boy Gold Mining Co., 200 U. S. 527; 50 L. Ed. 581.

Noble State Bank vs. Haskell, 219 U. S. 104; 55 L. Ed. 112.

Chicago & A. R. Co. vs. Tranberger, 238 U. S. 67; 59 L. Ed. 1204.

II. IS THE ACT A VALID EXERCISE OF THE POLICE POWER?

First of all, it is important to observe that the presumption of the constitutionality of statutes is the first barrier to be overcome in every attack upon them. This has been recognized and stated in numerous cases.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

Munn vs. Illinois, 94 U. S. 113; 24 L. Ed. 77, 83.

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"And, even aside from the consideration just adverted to, it is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority."

Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 531; 58 L. Ed. 713, 720.

The decisions of the Pennsylvania Supreme Court are to the same effect.

"We cannot try the constitutionality of a legislative act by the motives and designs of the lawmakers, however plainly expressed. If the act itself is within the scope of their authority it must stand, and we are bound to make it stand if it will upon any intentment. It is its effect not its purpose which must determine its validity. Nothing but a clear violation of the constitution, a clear usurpation of power prohibited, will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void."

Penna. R. R. Co. vs. Riblet, 66 Pa. 164, 169.

This language is quoted with approval in

Comth. vs. Keary, 198 Pa. 500, 501.

Comth. vs. Moir, 199 Pa. 534, 543.

Powell vs. Comth., 114 Pa. 235, 292-293.

The second barrier in the way of an attack upon the constitutionality of any act of assembly, which rests for its sanction upon the police power of the state, is that pro-

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vision in Section 3 of Article XVI of the Constitution of 1874, which reads:

“The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights or the general well being of the state.”

This declaration of the Constitution, that the police power of the state shall never be abridged, is nothing more than a declaration of the common law, for a state has not the power to barter away its police power, had it the will to do so.

Cooley Const. Lim., p. 343.

White Const. of Penna., p. 445.

Penna. R. R. Co. vs. Riblet, 66 Pa. 164, 168.

Penna. R. R. Co. vs. Braddock Elect. Ry. Co., 152 Pa. 116.

McKeesport City vs. Pass. Ry. Co., 2 Pa. Super. Ct. 242.

Light, Heat & Power Co. vs. Kittanning Borough, 11 Pa. Super. Ct. 31.

Comth. vs. Beatty, 15 Pa. Super. Ct. 5. •

Erie City vs. Erie Electric Co., 24 Pa. Super. Ct. 77.

We come now to consider the various grounds of attack upon the Kohler Act. It is contended:

(a) That it impairs the obligation of contracts such as that contained in the deed from the defendant to Alexander Craig, predecessor in title of the plaintiffs, in violation of Section 10 of Article I of the Constitution of the United States, and of Section 17 of Article I of the Constitution of Pennsylvania, and in effect amounts to

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the taking of private property without just compensation, in violation of Section 10 of Article I of the Constitution of Pennsylvania.

All that is urged by counsel for the appellee as to the effect of the reservation in the above mentioned deed, and the inviolability of the contract obligation, may be conceded if the validity of this act of assembly is to be determined solely by its relation to the contract-status of the plaintiffs and the defendant. *But a larger principle controls here.*

All property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. All rights are held subject to the police power of the state.

"We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as will prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

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"This power legitimately exercised can neither be limited by contract nor bartered away by legislation."

Holden vs. Hardy, 169 U. S. 366, 392; 42 L. Ed. 780, 791.

"There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligation of contracts.

"It is likewise thoroughly established in this court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

N. P. R. R. Co. vs. Minnesota, 208 U. S. 583, 596; 52 L. Ed. 630, 636; and cases cited.

"The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in pri-

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vate interests, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

N. P. R. R. Co. vs. Minnesota, 208 U. S. 583, 597; 52 L. Ed. 630, 636.

Cited and followed in

Pa. R. R. Co. vs. Ewing, 241 Pa. 591-592.

As to the contention that by condemnation proceedings only, and by payment of compensation, can the right of support of the surface be acquired, and the defendant deprived of its "Third Estate," the same distinction between *juris privati* and *juris publici* must prevail.

"If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to be provided against.

"Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to the public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment.'

"From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not."

Freund's Police Power, Section 511.

This principle was adopted and applied in *Commonwealth vs. Plymouth Coal Co.*, 232 Pa. 141, a brief quotation from which will suffice.

"The police power is distinguished from the right of eminent domain in that the state, by exercising the latter right, takes private property for public use, thereby entitling the owner to compensation under the constitution, while the police power, founded as it is on the maxim '*sic utere tuo ut alienum non laedas*', is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather destroyed in order to conserve the safety, morals, health or general welfare of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general (and, in this case, also the specific) benefits resulting from the exercise of the police power: 22 Am. & En. Ency. of Law (2d ed.), 916, and cases there cited. * * * *

"The enactment here in question does not authorize a taking of property for public use, is not an exercise of the right of eminent domain, and therefore, is not unconstitutional, because of failure to provide for compensation; but it regulates the use of tangible property—the coal in the pillar—by requiring the owner to use it (negatively by leaving it unmined) as not to injure the rights of others, or, in another aspect of the case, does not affect tangible property at all, but destroys an intangible property right (that of mining out the pillar coal) in the interest of the public safety. In either case it is, in our opinion, an exercise of the police power, justi-

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fied by the circumstances, and not violative of either the state or the federal constitution." (See pp. 149-151 of opinion.)

The language of the court last quoted seems most apposite to this act of assembly. It was adopted by the Supreme Court in a per curiam opinion, and the case was, on appeal, affirmed by the Supreme Court of the United States in

Plymouth Coal Co. vs. Pennsylvania, 232 U. S. 531; 59 L. Ed. 713.

Counsel for the appellee seek to distinguish the Kohler Act from the Barrier Pillar Act of June 2, 1891, sustained in the *Plymouth* case, on the ground that the latter was only temporary in its effect, and did not deprive the owner of his coal, nor transfer its use to another by way of imposing a permanent easement of surface support.

In substance the distinction is fanciful, not real; for the Kohler Act merely forbids the mining of coal to the danger of life of the public. It does not at all prohibit the removal of coal, because by Sections 2 and 3 the act recognizes and sanctions the "pillar" system of mining, so that no more coal is required to be left in place than under the Barrier Pillar Act of 1891.

(b) That the act deprives the defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and of Section 10 of Article I of the Constitution of Pennsylvania.

In addition to the authorities cited in paragraph (a) *supra*, we find others that are even more emphatic in subordinating the "due process" clause to the legitimate exercise of the police power.

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"The Fourteenth Amendment of the United States Constitution is not designed to interfere with the power of the State, sometimes termed 'its police power,' to prescribe regulations to promote the health, peace, good morals, education and good order of the people."

Barbier vs. Connelly, 113 U. S. 27; 28 L. Ed. 923 (syllabus).

"The principle that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the Constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has never been regarded as incompatible with the principle,—equally vital, because essential to the peace and safety of society,—that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community. *Boston Beer Co. vs. Massachusetts*, 97 U. S. 32 (24:991); *Commonwealth vs. Alger*, 7 Cush. 53."

Mugler vs. Kansas, 123 U. S. 623, 663; 31 L. Ed. 205, 211.

"It is contended that the last statute is void in that it deprives all coming within its provisions of rights of liberty and property without due process of law, and denies to them the equal protection of the laws; rights which are secured by the Fourteenth Amendment of the Constitution of the United States.

"It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the State for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent

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with that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States."

Powell vs. Pennsylvania, 127 U. S. 678, 688; 32 L. Ed. 253, 256.

"It is also contended that the act (the oleomargarine act) is in conflict with the Fourteenth Amendment in that it deprives the defendant of his property without that compensation required by law. This contention is without merit, as was held in *Mugler vs. Kansas*."

Powell vs. Pennsylvania, 127 U. S. 678; 32 L. Ed. 253, 257.

The foregoing cases have been followed by the courts of Pennsylvania, and the principle is clearly and succinctly expressed by the Superior Court of that state, as follows:

"The police power of this state is difficult of definition, but it has been held by the courts to be the right to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community which does not encroach on a like power vested in congress or state legislatures by the federal constitution, or does not violate the provisions of the organic law; and it has been expressly held that the fourteenth amendment to the federal constitution was not designed to interfere with the exercise of that power by the state: *Powell vs. Penna.* 127 U. S. 678; *Powell vs. Com.*, 114 Pa. 265. Its essential quality, as a governmental agency

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Is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large. The principle that no person shall be deprived of life, liberty or property, without due process of law, was embodied in substance in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment, and it has never been regarded as incompatible with the principle, equally vital because equally essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community: *Boston Beer Co. vs. Massachusetts*, 97 U. S. 25."

Commonwealth vs. Beatty, 15 Pa. Super. Ct. 5,
15.

This language is quoted with approval in *Commonwealth vs. Plymouth Coal Co.*, 232 Pa., 141, 145; *Buffalo Branch Mutual Film Corporation vs. Breiting*, 250 Pa. 225, 233; and *Commonwealth vs. Wormser*, 260 Pa. 44.

Further citations seem unnecessary. If the Kohler act is, under all the circumstances, a reasonable exercise of the police power for the protection of life, health and safety, then it is paramount to all constitutional inhibitions that look to the protection of private property rights only. It all depends upon the point of view. If facts affecting the public welfare, so notorious that judicial notice must be taken of them, are believed to be the reason for the passage of the act, this court can but sustain its validity. But if the contention of counsel for Plaintiff in Error that the act is a mere subterfuge or camouflage in guise of the police power, to transfer property of this and other like mine owners to private, or even public surface

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owners is to be taken as true, then is the hope of the public in vain that any means of relief from so intolerable a situation can ever be secured.

The foregoing objections, (a) and (b), go to the substance of the act. But counsel for the appellee attack also the form of the act, and contend

(c) That it is both local and special legislation, in violation of Section 7 of Article III of the Constitution of Pennsylvania, which prohibits the legislature from passing

“any local or special law regulating the affairs of counties, cities, townships, wards, boroughs or school districts,” * * * * or “regulating labor, trade, mining or manufacturing.”

Local because the act applies only to those parts of the state in which anthracite coal is found, and to only a portion of that area, townships of the second class being excepted from its operation. And *special*, because it applies only to the mining of anthracite coal and not to the mining of bituminous coal, iron ore, quartz, rock or any other mineral.

As these points were seriously pressed in the Court below by counsel for Plaintiff in Error, we beg the indulgence of the court if we verge on prolixness in stating fully our position in these respects.

The distinction between general laws and local or special laws has been succinctly stated as follows:

“A *general law* is one which applies to the whole state, and which affects all the objects or all members of a class of objects, to which it can appropriately apply. A *local law* is one which applies to but a portion of the Commonwealth, and a *special law* is one which affects some members of a class of objects, to all of which it may apply, to the *exclusion* of others;” *White; Const. of Penna.*, p. 238.

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In applying these distinctions the principle of classification has been recognized as a proper criterion of interpretation.

With reference to classes by natural selection, e. g. married women, minors, corporations, etc., legislation affecting each class is unobjectionable. And where natural classification does not exist artificial classification has been resorted to and sustained; as in the case of classification of cities, counties, boroughs, schools, districts and townships, according to population.

Wheeler vs. Philadelphia, 77 Pa. 338.

Lloyd vs. Smith, 176 Pa. 213.

Comth. vs. Gilligan, 195 Pa. 504.

Comth. vs. Blackley, 198 Pa. 372.

With regard to such municipal divisions classification "is the grouping together for purposes of legislation of communities or public bodies which by reason of similarity of situation, circumstances, requirements and convenience, will have their public interests best subserved by similar regulations."

Comth. vs. Gilligan, 195 Pa. 504, 509.

Where such conditions exist a necessity for classification arises:

"A necessity springing from manifest peculiarities distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others. Laws enacted in pursuance of such classification and for such purposes, are, properly speaking, neither local nor special. They are general laws, because they are applicable to all that are similarly situated as to their peculiar necessities."

Ayars Appeal, 122 Pa. 266, 281.

Comth. vs. Gilligan, 195 Pa. 504, 510.

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"Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification."

Seabolt vs. Commissioners, 187 Pa. 318, 323.

With respect to classification of municipalities it has been said that classification

"Authorizes such legislation as relates to the exercise of the corporate powers possessed by cities (municipalities) of the particular class to which the legislation relates, and to the number, character, powers and duties of the officers employed in the management of municipal affairs. These are the purposes contemplated; they are the only purposes for which classification seems desirable; they are the only purposes for which it has been upheld by this court."

Ruan Street, 132 Pa. 257, 275;

Wyoming Street, Pittsburgh, 137 Pa. 484.

In the Ruan Street case the court, on page 276 of its opinion, further say:

"Among the many subjects of legislation which classification presents we may call attention to such as the establishment, maintenance and control of an adequate police force for the public protection; the preservation of the public health; protection against fire; the provision of an adequate water sup-

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ply; the paving, grading, curbing and laying of the public streets; the regulation of markets and market houses, etc.;"

to which may be added the *preservation of the public safety*. That is to say, such classification is valid in all matters of police regulation, of which we find the following instances which have been sustained by the courts:

In *Comth. vs. Hanley*, 15 Super. Ct. 271, the act of June 7, 1895, P. L. 157, creating a State Board of Undertakers in cities of the first, second and third classes, and requiring undertakers in such cities to register with and procure a license from said board was attacked as being local or special legislation. It was held by the court not to be a trade regulation but a legitimate exercise of the police power, and therefore a proper subject of classification, citing the following authorities:

"All legislation is necessarily based on a classification of its subjects, and where such classification is fairly made, laws enacted in conformity thereto cannot be properly characterized as local or special; *Ayar's Appeal*, 122 Pa. 266; * * * * Where no legislative intent to evade the restrictions appears the courts will look beyond the mere form of the act and examine its true intent and effect in the light of the purpose of the constitutional restrictions; *Comth. vs. Gilligan*, 195 Pa. 504." (See p. 280 of opinion).

In the case of *Comth. vs. Charity Hospital of Pittsburgh*, 198 Pa. 270, the act of April 30, 1899, P. L. 66, was the subject of consideration. That was entitled "An act for the preservation of the public health, prohibiting hereafter the establishing or maintaining of additional hospitals, pest houses or burial grounds, in the built-up portions of cities."

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The defendant claimed that the act was a violation of Section 7 of Article III, forbidding local or special laws "regulating the affairs of counties, cities, etc.," because "the act does not relate to any matter peculiar to cities, and does not relate to the exercise of any corporate power, and because it is a law applying only to selected portions of the state," while the Commonwealth contended that since the act was "intended to protect the health of the inhabitants of cities, the protection of the public health being a subject of municipal control, therefore, laws passed in regard to hospitals, etc., in cities, or in any class of cities, are general and not local." The court below in its opinion, p. 275-277, (which was affirmed in a per curiam by the Supreme Court) says:

"We cannot agree with the contention that merely because the act is intended to protect the public health it may be made to apply to cities, or a particular class of cities, without becoming local. If the legislature, for the protection of health in cities, should undertake to prohibit the sale of cigarettes to minors, or oleomargarine to anybody in all the cities of the Commonwealth, it could not be claimed that the act was valid. There must be the additional element that the danger to be guarded against *has relation to the local conditions*. Cigarettes and oleomargarine are equally deadly in a forest and in a city, but not so a hospital or pest house * * * * There is obviously much greater danger to the general public health from such institutions in a populous city than in the county or in a village, and the danger will be in proportion to the number and density of the population * * * * When, therefore, a statute prohibits hospitals, etc., in the built up portions of cities it thereby draws a line, having the populous centers on one side and the less populous on the other, in a case where the

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supposed evil does or does not exist according to the greater or less density of population."

The court therefore held the act to be not local legislation, but a general act regulating the location of the institutions in question, by prohibiting them in all the more populous places of the state down to a certain line.

In *Beltz vs. Pittsburgh*, 26 Super. Ct. 66, the act of June 7, 1901, P. L. 493, requiring the registration and licensing of plumbers in cities of the second class, was held constitutional; the court saying, page 70, of its opinion:

"The prevention of disease by the municipal authority is as clearly a municipal function as its prevention by quarantine or otherwise. Legislation designed to guard against disease, by establishing or promoting the sanitary condition most favorable to health must be deemed within the purposes for which the classification of cities (municipalities) is permitted."

If, then, legislation for preservation of the public health by measures for the prevention of disease is a proper municipal function, and classification according to local needs, conditions and circumstances, is permissible for that purpose, it goes without saying that legislation for the preservation of public safety, lives even, is equally a proper municipal function, and classification according to local needs and conditions likewise permissible.

Viewed in the light of the foregoing authorities what is the status of the Kohler act?

Its title purports to regulate the mining of anthracite coal; to prescribe the duties (which include the necessary powers) of certain municipal officers; and to impose penalties.

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The disastrous results of unregulated mining, well known to the legislature, constituted the moving cause and purpose of the act, viz., the preservation of the public safety and human life in populous communities which have been endangered by carrying on mining operations in such manner as to remove the natural support of the surface of the soil.

Section 1 forbids the continuance of such operations in any and all anthracite mines or mining operations.

Sections 2 and 3 require the preparation of accurate maps or plans, showing the existing workings or excavations of all mines, and also of the contemplated workings to be undertaken within any succeeding six months; the filing of such maps with the proper municipal authorities, and the designation of each pillar of coal both in place and upon such map or plans.

Section 6 provides that the act shall not apply to (mines in)

- (a) Townships of the second class (i. e. townships having a population of less than 300 to the square mile);
- (b) Any area wherein the surface overlying the mine or mining operation is wild or unseated land; and
- (c) Where such surface is owned by the owner or operator of underlying coal, and is distant more than 150 feet from any improved property belonging to any other person.

Sections 4 and 5 empower (and the power implies a correlative duty) the municipal authorities of cities, boroughs, and townships of the first class, to make inspection of such mines for the purpose of determining whether the provisions of the act are being complied with, and to prevent mining operations when the provisions of the act have been violated.

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The first question, therefore, is: Do the three territorial exemptions or exceptions (a), (b) and (c), above specified, and the non-inclusion of the municipal authorities of townships of the second class, constitute a violation of that clause of Section 7 of Article III of the Constitution which forbids local or special legislation regulating the affairs of cities, boroughs and townships? We confidently contend that they do not.

First, because every presumption is in favor of the constitutionality of the act; see cases cited on page 15, ante. The burden of showing its invalidity rests upon those who attack it.

This case as presented at bar does not show either by pleadings or by proofs that anthracite and bituminous coal are so similar that they cannot be classified differently.

Second, because not only for the exercise of legislative and administrative functions but also for the exercise of municipal police powers, classification according to population is the main, if not the only basis to be adopted.

Wheeler vs. Philadelphia, 77 Pa. 338.

*Beltz vs. Pittsburgh, 26 Super. Ct. 266 (cited
supra).*

Third, because the act expressly recognizes the principle that conditions attendant upon mining in densely populated communities greatly differ from, and are more dangerous than, those in sparsely settled or uninhabited districts.

Comth. vs. Hanly, 15 Super. Ct. 270.

*Beltz vs. Pittsburgh, 26 Super. Ct. 66 (cited
supra).*

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Fourth, because, as shown in the first part of our argument, the act is a reasonable and most necessary exercise of the police power, resting upon a necessity.

“Springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for one class, separately, that would be useless and detrimental to the others.”

Ayars' Appeal, 122 Pa. 266 (cited supra).

In this connection let us suppose that this distinction based upon density of population had not been adopted, and that the requirements of the act had applied as well to mines in sparsely settled townships or under wild and unseated lands. Then, since every exercise of the police power must be reasonable, would not the act at once be attacked on the ground that it was unreasonable, “useless and detrimental” to enforce its provisions in localities where common sense and common consent would declare no necessity or danger to exist? *Ex vi termini* the argument against the classification made by this act defeats itself.

To the further possible objection that Sections 4 and 5 of the act offend against that clause of Section 7 of Article III which forbids local or special legislation “prescribing the powers and duties of officers in cities, boroughs and townships,” in that certain powers (and duties), different from and more extensive than any police powers conferred by former municipal legislation, are devolved by the act upon the officials of only three out of four municipal divisions, and therefore these Sections 4 and 5 are local in effect, it may be replied that while these powers are of the same character as those which it is the duty of the mayor, burgess, etc., to enforce in maintaining the police powers generally granted to all municipalities, yet,

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in fact, this act is not a piece of municipal legislation, but is a direct exercise by the state of its inherent police powers, and the selection of a mayor, burgess or commissioner, as the agent to enforce those powers is but the appointment by the state of its own officer, even though such agent be also for other purposes a municipal officer. The constitutional prohibition above quoted does not prohibit the state from imposing additional duties, owing to itself, upon municipal officers *virtute officii*.

Knisely vs. Cotterel, 196 Pa. 614.

In re Registration of Campbell, 197 Pa. 589.

It may be added that if the objection should be sustained that Sections 4 and 5 are in effect local legislation, yet the elimination of those sections would not affect the validity of the rest of the act, since those sections are easily severable, and the other provisions of the act can be enforced without them.

Comth. vs. Moir, 199 Pa. 534.

Comth. vs. Shaleen, 30 Super. Ct. 1, 14.

It being the legislative intent, clearly expressed in Section 10 of the act, that the part held to be valid should be enforced although the other part should fall; *Comth. vs. Shaleen*, *supra*.

The second question is whether the Kohler bill is *special* legislation, because mines in townships of the second class and in uninhabited districts are excluded from its terms. To this we give an answer even more strongly negative. In addition to the reasons heretofore given to show that classification of measures for preservation of public health and safety is rightly based upon local needs and conditions, and upon density of population, we find that heretofore the legislature has passed, and the courts have

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sustained, acts of assembly relating to mines and mining operations. They are as follows:

1. "The Mine Ventilation Act" of 1870, referred to on page 4, ante.

2. The act of June 2, 1891, P. L. 76, which relates to anthracite coal mines only, being entitled "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and the protection and preservation of property connected therewith." This act was upheld in *Durkin vs. Kingston Coal Co.*, 171 Pa. 193; and to the objection that the act did not apply to mines where only ten or less persons were employed the court said (page 204 of opinion):

"The definitions found in the act of 1891 seem to us reasonable, to be within the fair limits of a legislative definition, and to exclude only such operations as are too small to make the general regulations provided by the act applicable to them."

To the same effect see *Consolidated Coal Co. vs. Illinois*, 185 U. S. 203; 46 L. Ed. 873.

It may be noted also that Sections 1 and 2 of that act confined its operations to certain counties of the state, and parts only of certain counties, but it was not even suggested that it was local legislation for that reason.

3. The act of May 15, 1893, P. L. 52, entitled "An act relating to bituminous coal mines and providing for the lives, health, safety and welfare of persons employed therein," was considered and its validity sustained, in the case of *Comth. vs. Jones*, 4 Super. Ct. 362; the court holding that the division of coal mines into two classes was proper because of their different physical conditions and requirements. This act also did not apply to mines where less than ten persons were employed.

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The court, Smith, J., further suggested that even if the act were local or special in its application it might be sustained as an exercise of the police power of the state for the protection of life, health and property, saying, pp. 371-372 of opinion:

"Speaking for myself, I regard it important, in considering the constitutional prohibition of 'any local or special law' upon the subjects enumerated in Article III, Section 7, to take into account the provision of Article XVI, Section 3, that "the exercise of the police power of the state shall never be abridged."

"It is difficult to regard the latter provision as merely aimed at a legislative abridgment of the police power of the state. The legislature may forbear or neglect to exercise the police power, but no legislative enactment on the subject can abridge the power of a subsequent legislature in the premises, and, as this principle exists independent of the constitutional provision, it was unnecessary as a limitation on the power of the legislature.

"These prohibitive provisions are to be so construed that both shall stand, if possible. If the prohibition of local or special legislation includes the exercise of the police power in relation to local or special subjects, it is a serious abridgment of that power. The broad and unqualified terms of the section relating to the police power would seem to imply that no abridgment in any manner was intended. Full effect may be given to this section by regarding it as a qualification of the prohibition of local or special legislation, in the nature of a proviso, excepting from that prohibition the exercise of the police power of the state on the subjects embraced in it. Such a construction would harmonize the two constitu-

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tional prohibitions, and permit an unabridged exercise of the police power on all matters within its scope, whether general, or local and special, leaving to judicial construction, as heretofore, the character and limitations of that power.

"In this view, the act of 1893, even if local or special in its application, may be sustained as an exercise of the police power of the state, for the protection of life, health and property in the mining operations to which it relates."

Commonwealth, Appellant, vs. Jones, 4 Pa. Super. Ct. 371, 372.

The principle so modestly suggested by that conservative jurist, namely, that each and every provision of the constitution, prohibitive or otherwise, must be read in connection with and subject to the broad and unqualified terms of the section relating to the police power, in such manner that no abridgment of that power is or can be intended, has since received the sanction of the Pennsylvania Supreme Court in *City of Scranton vs. Public Service Commission, et al.*, 268 Pa. 192, where it was held that the provisions of Article XVII, Section 9, that

"No street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities."

must

"be read in connection with the equally clear third section of Article XVI of the constitution, which declares that 'the exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the state.' This is but declaratory of an implied power of the State, in-

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herent in all forms of government: *Com. vs. Vrooman*, 164 Pa. 306; and it needs no constitutional reservation or declaration to support it."

It had been declared also in the earlier case of *Wilkinsburg Borough vs. Public Service Commission*, 72 Pa. Super. Ct. 423, where the same question arose, and it was held that

"Section 9 of Article XVII of the Constitution of Pennsylvania, construed in connection with Section 3 of Article XVI of the same Constitution, providing that 'the exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State,' does not deprive the State of authority to regulate the rates of public service corporations for the general welfare of its inhabitants." (See paragraph 4 of syllabus p. 424).

That these were rate cases between a municipality and a public service company does not affect the principle, for in the last cited case the court, quoting from *Leiper vs. B. & P. R. R. Co.*, 262 Pa. 328, 332, say:

"When the rights of individuals under a contract which would otherwise be perfectly valid are in conflict with the 'general well-being of the state,' the rights of an individual must give way to the general welfare." (See opinion, p. 431).

Both of the foregoing cases rest the police power upon the general welfare clause. A *fortiori* should the police power be sustained in order to protect the lives and safety of the public?

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As stated in a former part of our argument, these two acts related only to the safety of employes, whereas the Kohler bill relates to the safety of the public, and is therefore of even greater necessity.

The case of *Durkin vs. Kingston Coal Co.*, supra, is cited with approval in *Comth. vs. Grossman*, 248 Pa. 11, 18, with reference to the classification of coal mines made by the act of 1891, and the same case is again referred to in *Comth. vs. Alden Coal Co.*, 251 Pa. 134, where the court say (page 139 of opinion) :

"Whenever a distinction is made between the two (anthracite and bituminous) it is based upon a substantial difference, that is, one so marked as to call for special legislation, and further that in every case there is correspondence between the difference, which is made the basis of the classification and the object and purpose of the statute. The case of *Durkin vs. Kingston Coal Co.*, 171 Pa. 193, is a fair illustration."

The third question is whether the act is *special* legislation because it applies to anthracite mining only and not to bituminous mining. The answer is complete, in that the physical conditions and requirements and methods of operation differ so essentially as to make separate classification a necessity. Among these differences are

- (1) The limited areas of anthracite coal and the widely extended areas of bituminous;
- (2) The greater thickness and number of the veins of anthracite coal;
- (3) The fact that the two kinds of coal are found in different localities, neither being found in the territory of the other, and no county in the state containing both;

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(4) That they are produced from different geological formations, their very substance being different;

(5) That anthracite is mined by means of deep shafts; bituminous generally by lateral or horizontal drifts;

(6) That different methods of mining are required;

(7) That, and this is a well known fact of which judicial notice must be taken, the anthracite mines are in a thickly populated section of the state, while bituminous mines are located in sparsely settled territory;

(8) That, and of this also should judicial notice be taken, the dangers to public safety and life are a hundred-fold greater from the mining of anthracite coal than of bituminous coal.

These last two differences alone are sufficient ground for the classification made by the act: "*Ex facto jus oritur.*"

A fourth refinement is drawn by counsel for appellee, namely, that the act is *special* legislation because it segregates anthracite coal alone, and does not include other minerals such as iron ore, quartz, rock, sandstone, or other underlying strata. Again the answer is *Ex facto jus oritur.*

Oil and gas are also minerals; but it would be the height of absurdity to embrace them in an act regulating and prescribing duties as to the mining of coal, whether anthracite or bituminous. So in an act, the purpose of which is the protection of life and safety of the public, it would be "useless and detrimental" (*Ayars' Appeal*, 122 Pa. 266) to the owners of such other underlying strata to include them within its prohibitions and penalties; not only because of the absence of proof of danger

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to the public from the removal or quarrying of such other substances, but a *fortiori* because it is a matter of common knowledge, of which the court will take judicial notice, that anthracite coal is the only mineral of which the removal has heretofore or will hereafter result in serious injury to the public.

Therefore, to quote from *Comth. vs. Alden Coal Co.*, 251 Pa. 134, 139-140 (which case is the criterion urged by counsel for appellee), there is here

"a correspondence between the difference, which is made the basis of the classification, and the design and purpose of the legislation. . . . It rests on a difference which bears a natural, reasonable and just relation to the act in regard to which the classification is proposed."

To quote from *Seabolt vs. Commissioners*, 187 Pa. 318, 323:

"Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified. . . . If the distinctions are genuine, the courts cannot declare the classification void. . . . The test is, not wisdom, but good faith in the classification."

The language of Mr. Justice Brewer, in *Railway Co. vs. Ellis*, 165 U. S. 150, 165, quoted by the Pennsylvania Supreme Court in *Junata Limestone Co. vs. Fogley*, 187 Pa. 193, 197, is peculiarly appropriate to the facts in this case, viz:

"It must appear not only that the classification has been made, but also that it is one based upon some reasonable grounds, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.

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And lastly, it is contended by counsel for appellee that the act, being special and class legislation, deprives those subject to its provisions of the "equal protection of the laws" guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it makes the same act a crime if done by one person (the anthracite miner), and not a crime if done by a miner of bituminous coal or other minerals.

The answer to this position is to be found in those cases cited in the earlier part of our argument, ante, pp. 28-30, which support a classification based upon density of population, and in the differing results upon the public welfare.

The distinction lies in the acts done, not in the persons. The same act may be grossly negligent, criminal even, under circumstances affecting the public;—e. g. speed regulations in cities, etc., versus rural districts;—and entirely permissible and harmless under other conditions. If classification of the acts forbidden is valid and the statute embraces all of that class, then the Fourteenth Amendment has no application.

"Legislation which in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Barbier vs. Connelly, 113, U. S. 25, 32; 28 L. Ed. 923, 925.

Bell's Gap R. Co. vs. Comth. of Penna. 134 U. S. 232; 33 L. Ed. 892.

Field vs. Barber Asphalt Paving Co., 194 U. S. 618; 48 L. Ed. 1142.

Argument—Reply to Dissenting Opinion of Mr. Justice Kephart and to Argument for Plaintiff in Error

III. REPLY TO DISSENTING OPINION OF MR. JUSTICE KEPHART, AND TO ARGUMENT FOR PLAINTIFF IN ERROR.

The argument of the Dissenting Opinion (Transcript of Record, pp. 78-88) like that of the plaintiff in error is based upon three averments, two of law and one of fact.

First. That the only issue in this case is the contract-status of the defendants in error and the plaintiff in error; see argument, pages 14, 33.

Second. That to enforce the Kohler Act in this case will forever deprive the plaintiff in error of so much of its coal as will be required to provide surface support for the premises of the defendants in error.

Third. That the rules of law applicable to the exercise of the power of eminent domain and not of the police power alone apply to this case.

The answer to the first assertion is that, as held by the Pennsylvania Supreme Court, the defendants in error stand *in loco publici*. The fact that they alone were threatened by the Coal Company with removal of surface support cannot and does not confer the right upon that company openly to flout the public policy of the State as declared by the Kohler Act, or to interpose as a shield for its flagrant violation of that act the contractual relation that the defendants in error, as individuals, bear to the plaintiff in error. Whether by accident or by design the plaintiff in error has picked upon the slenderest peg, a single dwelling, "used as a human habitation," for its attack. What, it is fair to ask, would be the answer had the company notified the owners of a hospital, a church, a hotel, a railroad station, that it intended to continue its mining operations in a manner to cause subsidence of the land on which such building stood?

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The act protects every structure "used as a human habitation," whether by one or by a hundred persons, every structure used as a consortium for the public, every structure or facility habitually used by the public. That heretofore the State had never exercised its dormant police power in these particulars does not deprive it of that power, or of the right to invoke it when conditions and circumstances have so changed as to make it imperative for safeguarding the rights of the public, whether represented by an individual or en masse; see majority opinion in this case, page 73, and Cooley on Const. Lim. (5th Ed.) page 710.

That property rights of either may suffer is but an incident; is subordinate to the safety of the public, the public being but the aggregate of all its parts, and suffering whenever individual safety and welfare are sacrificed; Commonwealth vs. Plymouth Coal Co., 232 Pa. 141, 146.

On page 33 of the argument for plaintiff in error it is stated:

"The Kohler Act is not a police regulation, first, because it operates and, when examined in connection with its twin measure, the Fowler Act, was obviously intended, not for the benefit of the public but solely for that of a favored and restricted class of *private* citizens; second, because it is not merely a regulation of mining, but also, and primarily, a transfer of a property right, the perpetual use of a vast amount of coal in the ground, *from one citizen to another.*" (Italics ours).

Plaintiff in error substitutes an incidental result for the cause. The true cause was the widespread devastation and loss of life resulting from reckless mining methods which were the subject of careful investigation by Com-

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missions, by the Legislature, by the Governor, and were of notorious occurrence; not the benefit to private citizens. One result it is true is the insuring of surface support to private citizens, not for the benefit, however, of their property, but for the protection of human life of the public. The whole argument magnifies the individual result and reverses the telescope to minimize the dangers to the public.

It lays particular stress upon the inhibitions of clause (d) of section 1 of the act and utterly ignores the inhibitions of clauses (a), (b) and (c) which assert the *jus publici* as against the *jus privati*.

Both the Dissenting Opinion and the argument for plaintiff in error make virulent and flippant aspersions upon the honesty of the motives of the Legislature in passing and of the Governor in approving this Act, which seem to us both untenable and unwarranted; for the courts will not impute improper motives to any Legislature acting upon the results of impartial investigation by competent authorities; *Levy Leasing Co. vs. Siegel*, U. S. Advance Opinions No. 11 (Issue of April 15th, 1922) 326, 328.

For answer to the second assertion we have the finding of the majority opinion in this case (p. 72) that

"The statute before us is a police measure which does not, in any true legal sense, contemplate the taking of private property for public use (*Com. vs. Plymouth Coal Co.*, 232 Pa. 141, 149), or the transfer of it from one person to another: *Jackman vs. Rosenbaum Co.*, 263 Pa. 158, 167-70, and authorities there cited. In fact the prayers of the present bill suggest no such intention. They are * * * * second, that defendant be restrained from 'so conduct-

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ing its mining operations as to cause the caving-in, collapse or subsidence of plaintiff's dwelling;' and, third, for general relief—in other words, for such incidental interference with defendant's property rights, and such only as may be necessary in order to carry out the declared public policy of the state." (Italics ours).

Counsel for plaintiff in error complain bitterly of the fact that if the Kohler Act is sustained the company will be compelled to leave at least one-fourth of the underlying coal in place for surface support, as any substitute therefor would involve a prohibitive expense.

Just here we call attention to the fact that the act does not say so. There is not one word in the pleadings which says so. There is no proof before the Court that a mine owner cannot, even though at greater than ordinary expense, take out all the coal without causing "the cave-in, collapse or subsidence" of the surface. Yet plaintiff in error assumes and asserts that the act lays the dead hand of the law upon all anthracite mines and compels the owner to leave the coal forever under ground. Whether such is the fact is capable of proof, can be determined by expert engineers, for whose judgment the Kohler Act indirectly provides. In the absence of such proof will the Court undertake to judge so complicated a question, and upon that judgment, which would vary with each and every mine, base a decision that the act is unconstitutional?

But passing by these omissions from the record, we find in answer to the argument *ab inconvenienti*, a very pertinent deliverance of the Pennsylvania Supreme Court in the case of *Penna. R. R. Co. vs. Ewing*, 241 Pa. 581,

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where in discussing what is known as the Penna. Full Crew Law the Court, on page 591 of its opinion say:

"The Act being a valid exercise of police power by the legislature, the fact that railroad companies affected by it must make additional expenditures to comply with its provisions is an immaterial matter so far as courts are concerned. That fact was for the consideration of the legislature alone in determining whether the act should be passed. Uncompensated obedience to a regulation enacted for the public welfare or safety, under the police power of the State, is not taking property without due compensation, and any injury sustained in obeying such a regulation is but *damnum absque injuria*: New Orleans Gas Light Company vs. Drainage Commission of New Orleans, 197 U. S. 453. Northern Pacific Ry. Co. vs. Minnesota, ex rel. Duluth, 208 U. S. 583."

The dissenting opinion (p. 79) dwells at length upon the dire results to the public at large if coal companies are compelled to leave so large a part of their coal unmined, and suggests that the rights of this larger public are paramount to the safety of the lives of the comparatively few who occupy the territory where the "Third Estate" belongs to the coal companies, which territory in area is less than one-fifth of the whole anthracite region. If this argument should prevail and the case be reversed, we should at once have a swift resumption of the methods of mining against which the Kohler Act was a protest, a characteristic instance of which is found in the facts detailed in the case of Scranton City vs. Peoples Coal Co., 274 Pa. 63; for stripping of the pillars still in place would be so much cheaper than the further development of mines where the right of surface support remains in the owners

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of the surface; but the public at large would get their coal at the cost of perhaps hundreds of lives and the destruction perhaps of whole communities;—a sorry application of the rule “the greatest good to the greatest number.”

The same answer must be made to the application by plaintiff in error of the maxim *prior tempore potior jure*. As to this contention, we repeat *tempora mutantur*; new conditions have arisen for which the plaintiff in error and its confreres are themselves responsible. They should not be permitted to stain their pound of coal with the blood of innocent victims.

In support of the third assertion that the rules of law applicable to cases of eminent domain alone govern this case, counsel for the plaintiff in error quote at length from the case of *Pumpelly vs. Green Bay, etc., Co.*, 13 Wall. 166 (see pages 7-8 of brief). This needs no further comment further than to say that the facts show that it was purely a case of the exercise of the power of eminent domain, and not of the police power, which latter power was nowhere referred to by counsel or by the Court.

Jackman vs. Rosenbaum Co., 263 Pa. 158, 166, is also cited and the language of the Court relating to “Eminent Domain” on page 167 is quoted (see pages 28-29 of brief); but the very next paragraph of the same opinion adopts for that case the rule governing cases of “Police Power,” saying:

“The following, perhaps rather broadly put, statement of general principle, from *New Orleans Gas Light Co. vs. Drainage Commission*, 197 U. S. 453, 462 (citing *Chicago, etc., R. R. Co. vs. Chicago*, 166, U. S. 226, 255) that ‘uncompensated obedience to a regulation enacted for the public safety under the police power of the State, is not a taking of property without due compensation,’ has relevancy here.

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"It has been decided repeatedly that the 14th amendment to the Federal Constitution does not limit the police power of the states. As said in 12 C. J. 1197, 'The constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, do not limit, and were not intended to limit, the subjects on which the police power of the State may lawfully be exerted; these guaranties have never been construed as being incompatible with the principle, equally vital, because essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community'; see cases there cited and *Chicago & Alton R. R. Co. vs. Tranbarger*, 238 U. S. 67, 76; *New Orleans Gas Light Co. vs. Drainage Commission*, 197 U. S. 453, 462; also *Nolan vs. Jones*, recently decided by us, reported in 263 Pa. 124."

That was a "party wall" case, and the right of adjoining owners to enter upon and take possession of land of the other was reaffirmed and sustained. The underlying reasons for the "party wall" system are discussed very fully by the Court, but none of them rise to the dignity of protecting human life or safety.

This brings us back to the crux of the present case. Did the facts attendant upon former ruthless methods of mining warrant the legislature in declaring the public policy of the State against such methods, in pursuance of the two maxims *sic utere tuo ut alienum non laedas*, and *salus populi suprema lex*?

Both the dissenting opinion (pp. 8/-8c), and the argument for plaintiff in error (pp. 17, 22) refer at length to what is known as the Fowler Act, passed by the same leg-

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islature and approved on the same day as the Kohler Act, as proof that the legislature was not only disingenuous but dishonest in "labelling" the Kohler Act as a police measure; for the alleged reason that the Fowler Act expressly permits a mine owner or operator to do the very things that the Kohler Act forbids, *provided* the owner or operator pay a tax of two percentum on the market price of all anthracite coal mined by him, which it is argued is convincing proof that the legislature in passing the Kohler Act was in no sense actuated by a desire or intent to protect public life, but solely to restore to the owner of the surface the right to surface support with which he had previously parted.

Aside from the questionable right to impugn the motives of the legislature, it is to be noted that nowhere in the pleadings is there any reference to or offer in evidence of the Fowler Act. Nor was it called to the attention of the lower court. That Act was not before the lower Court or the Supreme Court for construction (see dissenting opinion, p. 78). Therefore, all references to it are de hors the record, and all discussion of it "irrelevant and impertinent."

It may, however, be observed that the privilege of continuing to mine under structures and highways protected by the Kohler Act is not absolute upon payment of the tax, but only upon application under oath "that the removal of such coal can be effected *without endangering human life, limb or health, or causing grave public harm.*" (See Sect. 14 of Fowler Act, p. 10a of Brief for Plaintiff in Error). (Italics ours).

And by Section 15 of the act the Commission created by the act is required to "make such investigation as appears to be required, and, if convinced of the truth of

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the matters set forth in the application, make an order permitting the applicant to carry out proposed mining operations, *under such safeguards of life, limb, health, and general welfare, as it may reasonably require.*" (Italic ours).

Surely the Fowler Act, equally with the Kohler Act, is a measure to protect human life and safety.

We come finally to consider the contention that the Kohler Act is an invalid exercise of the Police Power because it offends against certain provisions of the Constitution of Pennsylvania forbidding local or special legislation. We respectfully submit that this Court may and should accept and adopt the construction put upon those provisions by the Supreme Court of that State so far as they are applicable to the classifications made by the Kohler Act; namely, that such classifications

"do not, on the grounds of local or special legislation, constitute it a violation of the organic law of Pennsylvania; proper classification is permissible, and the act before us is in that category." (Majority opinion, p. 79).

The Constitution of its own State being before that Court for construction it is difficult to perceive where any federal question is involved. The position of this Court upon the question of State classification is fully stated in the recent case of *Lower Vein Coal Co. vs. Industrial Board of Indiana*, 255 U. S. 144; 65 L. Ed. 555.

This contention does not seem to be pressed seriously by counsel for Plaintiff in Error, whose only references to it are found on pages 14 and 16 of their argument, but the dissenting opinion of Mr. Justice Kephart (p. 85) refers to the table of cases (see Argument for Plaintiff

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in Error, p. 1a) showing more litigation over subsidences due to bituminous mining than to anthracite.

An examination of those bituminous cases shows that of the 36 enumerated only 5 involved any damage to a dwelling house, and in not a single one was there any averment, much less proof, that human life or safety was endangered. The facts relating to subsidences in Scranton and elsewhere are sufficient answer to the inference sought to be drawn from the numerous bituminous cases.

To repeat what we have stated in the earlier part of our argument, (p. 40), bituminous mines are in sparsely settled territory;—ten times as large in area as the 496 square miles (Argument for Plaintiff in Error, p. 11), comprising the anthracite territory; and there is no recorded instance of loss of life or limb from subsidences in the bituminous regions, while many lives have so been lost in the anthracite territory.

We contend, therefore, that the Kohler Act should be sustained as a reasonable and valid exercise of the police power of the State.

Respectfully submitted,

C. LARUE MUNSON,
EDGAR MUNSON,

Attorneys for Scranton Gas and
Water Company, Intervening
Defendants in Error.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1922.

NO. 549.

Pennsylvania Coal Company,
Plaintiff in Error,

vs.

H. J. Mahon and Margaret Craig Mahon,
Defendants in Error.

In Error to the Supreme Court of the State of
Pennsylvania

STATEMENT OF THE CASE.

H. J. Mahon and Margaret Craig Mahon, his wife, the defendants in error, and life-long residents and citizens of Pittston City, a City of the third class, Luzerne County, State of Pennsylvania, acquired by purchase on November 28, 1917, from S. M. Parke, and Bertha L. Parke, his wife, the surface of a lot of land having a frontage on Prospect Street in said City, of about ninety feet and a depth of about one hundred and eighty feet, improved *inter alia*, with a two-story frame dwelling house, which prior to and since said purchase has been used by them and the other members of their household as a human habitation. Said lands were purchased on February 7, 1878, from the Pennsylvania Coal Company, the plaintiff in error (a corporation of the State of Pennsylvania legally authorized to own and operate coal lands in the State of Pennsylvania, and which at that time was the owner

of *such portion* of the coal and other minerals underlying said land *as then remained unmined and unremoved*) by Alexander Craig, who later erected thereon said dwelling house and other improvements, and through whom defendants in error by divers conveyances became the owners of said lands and dwelling house.

On September 2, 1921, said plaintiff in error mining company or corporation, which for many years has been engaged in the business of mining anthracite coal in and about said City of Pittston, and the shipment of same to market, notified defendants in error in writing that in the course of its mining operations underneath the surface lands on which was located dwelling house of defendants in error, it would reach a point on September 15, 1921, where the removal of further quantities of coal would so weaken the subjacent support of the premises of defendants in error as to cause the caving in, collapse and subsidence of, and injury to said surface lands and improvements, including said dwelling house, and advised defendants in error that it was desirous they should know of the situation so that they might take proper steps for the protection of their dwelling house and the safety of themselves and the members of their household during the continuance of said threatened disturbance.

Defendants in error knew that if further quantities of coal were removed from underneath their dwelling house and lands, as proposed by the plaintiff in error corporation, its so doing would cause the caving in, collapse and subsidence of the dwelling house of defendants in error, and that were the latter or the members of their household to remain therein during said disturbance they would run the risk of serious personal injury.

Defendants in error believing that said proposed action by plaintiff in error corporation (which, if carried out, would cause the caving in, collapse and subsidence of their dwelling house while used as a human habitation) was unlawful and in contravention of the provisions of the Act of the General Assembly of Pennsylvania approved May 27, 1921, P. L. 1198, filed their bill of complaint asking for an injunction restraining the plaintiff in error corporation *from so conducting its mining operations as to cause the caving in, collapse and subsidence of their said dwelling house*. On filing of said bill of complaint, with injunction affidavits and bond, the Court granted a preliminary injunction as prayed for, but later on argument of the motion to continue same said injunction was refused and dissolved.

Plaintiff in error corporation in its answer to said bill of complaint admitted all of the material averments contained therein, but attacked the constitutionality of said Act of Assembly on grounds *inter alia* that it violated the impairment of obligation of contract clauses of the State and Federal Constitutions and that it was also violative of Section 10 of Article 1, of the State Constitution and of the Fourteenth Amendment to the Federal Constitution.

The Court dismissed the bill of complaint of defendants in error on the grounds that said Act of Assembly was unconstitutional in that it impaired the obligation of a contract and was a taking of private property for private use without compensation. On appeal by defendants in error to Supreme Court of Pennsylvania the judgment of the lower Court was reversed; said Act of Assembly was declared to be constitutional, and the bill of complaint of defendants

in error was reinstated. The case now comes into this Court on a writ of error to and on appeal allowed by the Supreme Court of Pennsylvania, and the questions involved, as defendants in error believe and contend, are as follows, to wit:

THE QUESTIONS INVOLVED.

1. Does the Kohler Act impair the obligation of a contract in violation of Section 10 of Article 1 of Federal Constitution?

2. Does the Kohler Act deprive Coal Company of property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution?

3. Is the Kohler Act a bona fide exercise of the police power and does it deny to coal company the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution?

4. Does the Kohler Act deprive coal company of its property without just compensation in violation of the Fourteenth Amendment to Federal Constitution?

5. Is the decision of the State Court as to the extent and limitation of powers possessed by coal corporation, its own creature, as affected by the police power, a local and non federal question, and sufficient to maintain the judgment of that Court?

ARGUMENT.

Though the Pennsylvania Coal Company, plaintiff in error, admits the truth of all of the averments contained in the bill of complaint of defendants in error and though it is an undisputed fact as found by the Court below (See page 39, Transcript of Record) that

"if not restrained by injunction, the defendant company (plaintiff in error) will mine the coal and thereby cause the caving in, collapse and subsidence of the surface, together with the dwelling, entailing injury upon the plaintiffs," defendants in error, the latter feel that inasmuch as the facts or averments contained in said bill of complaint or found by the Court in a case of this character are not alone to be considered, "for due regard also must be had for what is within the range of common knowledge and what is otherwise plainly subject to judicial notice," it may be proper to state a few additional facts concerning the anthracite mine cave evil in the State of Pennsylvania and legislation, including the "Kohler Act," in relation thereto, as follows, to wit:

I.

THE ANTHRACITE MINE CAVE EVIL OF THE STATE OF PENNSYLVANIA, AND LEGISLATION IN RELATION THERETO.

The Anthracite Coal Field of Pennsylvania is located in the Northeastern part of the State; embraces an area of approximately five thousand square miles and comprises the nine counties of Carbon, Columbia, Dauphin, Lackawanna, Luzerne, Northumberland, Schuylkill, Susquehanna and Wayne. Although said State also has a Bituminous Coal Field, which extends over even a greater area territorially than the Anthracite, none of the nine counties enumerated produces Anthracite and Bituminous coal, because where one kind of coal is present the other is absent, and the former is usually most abundantly found in the valleys and the latter most frequently on the mountains. The Anthracite Coal veins (which usually lie horizontally; often obliquely, and range from one to ten in num-

ber) sometimes have a total thickness of over one hundred feet and sometimes reach a depth below the surface of twenty-two hundred feet, whereas the Bituminous coal veins (which also usually lie horizontally, often obliquely and range from one to three in number are usually each less than five feet in thickness and in depth below the surface rarely, if ever, exceed one hundred and fifty feet.

Upon the surface of the Anthracite Coal Field have been built up many cities, boroughs and villages whose total population consists of approximately one million persons, or in other words, one ninth of the total population of the entire Commonwealth.

Though the business of Anthracite coal mining in the State has been conducted and carried on for over two hundred years, (originally and for many years in a limited way and by primitive methods and latterly in a very extensive way and intensive manner and by improved modern methods), said operations up until within the last fifteen or twenty years were never conducted in such a manner or to such an extent as to imperil or destroy the lives of persons residing on the surface or to infringe the equal rights or the general well-being of the state.

In most, if not all, instances the surface land was owned by the anthracite coal owners or operators who as their coal mines were opened and the anthracite coal mining industry developed sold the surface rights to their employees, and others, for the purpose of constructing thereon dwelling houses, school houses, churches, theatres, railroad stations, hospitals, hotels, factories, stores, and other industrial and mercantile establishments where human labor was employed, and

in many instances said anthracite coal owners or operators plotted said surface lands into building lots and at or about the time of sale by them thereof dedicated streets, roads, and alleys for public use in connection therewith, on which streets and highways have since been constructed street railways, water pipes, gas mains, electric wires, sewer systems, conduits, and other necessary facilities for the service of the public and general welfare.

When all of the coal except the necessary pillars to support the surface had been mined out of the whole or some particular part of a coal mine (and as a rule from one fourth to one third of the underlying coal will adequately support the surface) the coal owner or operator who had so removed said coal, or quite generally some irresponsible or straw owner or operator of said coal who had succeeded to the paper title to the right to operate said coal mine, proceeded to remove said supporting pillars by a process known in the anthracite coal mining industry as "second mining," "third mining," etc., thereby causing mine caves, and this manner of using said coal property and prosecuting said anthracite coal industry resulted in "wrecked and dangerous streets, and highways, collapsed public buildings, churches, schools, factories, stores and private dwellings, broken gas, water and sewer systems, the great loss of human life, and in the creation of a condition which greatly imperiled and seriously endangered the lives and safety of large numbers of the people of the Commonwealth, and formed an ever-present menace to the well-being and general welfare of entire communities."

During the last fifteen or twenty years those "Anthracite mine caves" occurred with increasing pro-

portions and frequency, and involving, as they did, in many instances, great loss of human life and incalculable public and private property damage and loss, partook in their character of great catastrophes and public calamities, and by reason of their nature and the extent of their destructive consequences, became absolutely inimical to the safety, health, comfort and personal security of the citizens of the populous communities affected and afflicted thereby, that the Legislature of the State of Pennsylvania, attracted by the widespread and far reaching pernicious effect of this public evil passed a joint resolution, which was approved March 24, 1911, P. L. 26, providing for the appointment by the Governor of a commission "for the purpose of investigation and reporting upon physical conditions and legal rights in the matter of surface support where anthracite coal has been removed, or the right to remove said coal if vested in others than the owners of the surface, and for the further purpose of suggesting new legislation relative to the same." The Governor appointed a Commission in pursuance of said joint resolution and the same organized on June 12, 1911, and continued its investigations almost continuously from that date until March 1, 1913, when it made its report to the Governor and the General Assembly, which report is contained in the Legislative Journal of 1913, Pages 6947 to 6966.

After considering the report of said Commission the Legislature of the State passed the Act of July 26, 1913, P. L. 1439, Section 6 of which provides as follows: "It shall be unlawful for any person, firm, association, or corporation, to dig, mine, remove or carry away the coal, rock, earth, or other minerals or materials forming the natural support of the surface, beneath the streets, avenues, thoroughfares, courts, alleys, places and public highways of any municipal corpora-

ties within this Commonwealth, to such an extent and in such a manner as to thereby remove the necessary adequate support of the surface against subsidence, without having first placed, built, erected and constructed sufficient adequate and permanent artificial support in place and stand thereof, to maintain, uphold and preserve the stability of the surface of said streets, avenues, thoroughfares, courts, alleys, places and public highways."

Notwithstanding the foregoing and other legislative action, there was no diminution in the frequency of "Mine Caves" with their attendant and resultant loss of life and property in many of the populous cities, boroughs and first class townships within the anthracite coal field, and though other regulatory measures designed to promote the safety of the citizens and the general welfare of these municipalities, were introduced in the Legislature in 1907 and again in 1910, they failed of passage.

During the ten years and upwards that mine cave legislation had been considered by the Pennsylvania Legislature all material facts concerning the conditions, nature and extent, and harmful results of the Anthracite Mine Cave evil, by means of newspaper reports, public statistics, messages from the Governor of the Commonwealth to the General Assembly, reports of commissions created by joint resolution of the Legislature, public documents, and reports of other public officials, etc., had become matters of common knowledge and public notoriety.

On May 21, 1911, the Governor approved an Act of the State Legislature known as the "Dyer Act," P. L. 1122, establishing the Pennsylvania State Anthra-

racite Mine-Cave Commission, and an Act known as the "Kohler Act," P. L. 1198, hereinbefore referred to, both of which acts were passed by the State Legislature by an unanimous vote, and the declaration of the legislature concerning the public conditions hereinbefore indicated, with which all of its members, and the Governor of the Commonwealth, were thoroughly familiar, and which created the emergency that prompted the passage of the "Kohler Act" is set forth in its preamble, as follows, to-wit:

"Whereas the anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such manner as to remove the natural support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, stores and private dwellings, broken gas, water and sewer systems, the loss of human life, and in general so as to threaten and seriously endanger the lives and safety of large numbers of the people of the Commonwealth."

The constitutionality of this latter Act, known as the "Kohler Act," as a police regulation, and as affected if at all, by the suggested provisions of the Federal Constitution, together with the other question involved, will be discussed in the order and under the headings of the respective questions involved as hereinbefore set forth, to wit:

II.

THE KOHLER ACT DOES NOT IMPAIR THE OBLIGATION OF A CONTRACT IN VIOLATION OF SECTION 10 OF ARTICLE 1 OF FEDERAL CONSTITUTION.

Defendants in error respectfully contend that when their predecessor in title, Alexander Craig, on February 7, 1878, received and accepted from the Pennsylvania Coal Company, plaintiff in error, a deed for the surface of a building lot in the City of Pittston, from beneath which lot some, if not most of the coal had then been mined and removed (see Deed, pages 28-29 Transcript of Record), and a comparatively small part of which land later became and is now occupied by a dwelling house used as a human habitation, it was with the full knowledge and implied understanding, on the part of both parties to said deed and the waiver of surface support contract therein set forth, that any right said company therein reserved or thereby acquired to let down or cave in such part of said surface as later became and is now so occupied, was subject to the exercise of the police power of the Commonwealth of Pennsylvania in the interest of the general welfare and the health and safety of its citizens.

In other words, as stated by the Supreme Court of the United States in the case of *West River Co. vs. Dix*, 6 Howard, 507, "into all contracts made between states and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed and must be

presumed to be known and recognized by all, are binding upon all and need never, therefore, be carried into express stipulations, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control as conditions inherent and paramount, whenever a necessity for their execution shall occur."

And though plaintiff in error may have had the right to retain and except from the lands conveyed by said deed the common law right of surface support incident to surface land ownership, and though the grantee in said deed may have had the right by contract or agreement to exempt plaintiff in error from all liability to him, his heirs or assigns, for any damage that might be inflicted upon the surface of said lands by removing all the coal from beneath the same, it seems too plain for argument and too obvious for discussion that neither both nor either of the parties to said deed could by any contract between them involving the letting down or caving in of a dwelling house used as a human habitation in a populous community, or any other subject matter affecting the health or safety of citizens, or the well being of the State, withdraw a subject of that character from the supervisory control of the State Legislature, and if such a contract contravenes or is in any way at variance or inconsistent with the public policy of the State as declared and established by its legislation passed in the interest of the public good and general welfare, it must yield and be subordinated to that policy. If two individuals or corporations could by agreement estop the State from preventing by appropriate legislation the destruction of the life and property of its citizens, organized society could not exist with safety or security to its members or their property, for whenever the individual health,

safety and welfare are sacrificed the State must suffer and as stated by the Court in the case of *Enfield Toll Bridge Co. vs. The Hartford and New Haven Railroad Company*, 17 Conn. Rep 40, "if any property ought to be peculiarly guarded, it certainly is not that which is merely a matter of dollars and cents, but it should be the homestead, the fireside, the place where the owner has enjoyed his domestic comforts and where he proposes to spend his declining years."

In *Chicago B. & Q. R. R. Co. vs. McGuire*, 219 U. S. 549, the Court, in an opinion written by Justice Hughes, said "but the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected the State must suffer. Here there is no question as to the validity of the regulation or as to the power of the State to impose the liability which the statute prescribes. The freedom of contract is a qualified and not an absolute right.

"The right to contract is subject also, in the field of state action, to the essential authority of government to maintain peace and security and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction."

"The principle involved in these decisions, is that where the legislative action is arbitrary and has no

reasonable relation to a purpose which it is competent for government to effect the legislature transcends the limits of its power in interfering with the liberty of contract, but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short the legislative discretion within its prescribed limits should be exercised in a particular manner are matters for the judgment of the legislature and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

"There is no absolute freedom to do as one wills or to contract as one chooses. The guarantee of liberty does not withdraw from legislative supervision that wide department of activity which consists of making contracts or deny the government the power to provide the strictest safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community." See also *Crowley vs. Christensen*, 137 U. S. 86-89; *Jacobson vs. Mass.* 197 U. S. 11; *Frisbie vs. United States*, 157 U. S. 160.

"This Court has often declared that the most important function of government was to preserve the public health, morals and safety; that it could not divest itself of that power, nor by contract limit its exercise, and that even the constitu-

tional prohibition upon laws impairing the obligation of contracts does not restrict the power of the State to protect the health, the morals or the safety of the community, as the one or the other may be involved in the execution of such contracts."

Bowman vs. Chicago, 125 U. S. 492.

"If it were possible for individuals to estop due exercise of governmental power by private contracts, or private agreements they could impair the legislative power in practically all classes of cases.

"Neither the 'contract' clause nor the 'due process' clause of the Constitution abridges the power or duty of the legislature to enact appropriate and necessary laws in order to protect the health, safety, order, morals or general welfare of the public."

Marcus Brown Co. vs. Feldman, 256 U. S. 170.

"The Constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals and the public safety in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations."

Mugler vs. Kansas, 123 U. S. 623.

"The power of a State Legislature to make a contract of such a character that under the provisions of the Constitution it cannot be modified or abrogated, does not extend to subjects affecting public health or public morals, so as to limit the future exercise of legislative power on those subjects to the prejudice of the general welfare."

Butchers Union Slaughter House, Etc. Co. vs. Crescent City Co., 111 U. S. 746.

"It is likewise thoroughly established in this Court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection cannot be contracted away nor can the exercise of rights grantel, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

N Y. & N. E. Railroad Co. vs. Bristol, 151 U. S. 567.

"When the subject matter of such a contract is one which affects the safety and welfare of the public the contract is within the supervisory power and control of the legislature when exercised to protect the public safety, health and moral, and the clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked.

"The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public withdraw such subjects from the police power of the legislature."

Chicago, Etc. R. R. vs. Nebraska, 170 U. S. 57.

In *McLean vs. State of Arkansas*, 211 U. S. 539, the Court held that the state and federal cases demonstrated that a business by circumstances and its nature may arise from private to be of public concern and be subject, in consequence, to governmental regulation. It was also held that the liberty of contract which is protected against hostile state regulation is not universal, but is subject to legislative restriction in the exercise of the police power of the state. The legislature of a state is primarily the judge of the necessity of exercising the police power and courts will only interfere in the case the Act exceeds legislative authority; the fact that the court doubts its wisdom or propriety affords no ground for declaring the state law unconstitutional or invalid. The court further held that it is not unreasonable classification to divide coal mines into those where less than ten miners are employed and those where more than that number are employed, and the state police regulation is not unconstitutional under the equal protection clause of the Fourteenth Amendment, because only applicable to mines where more than ten miners are employed. See also *German Alliance Insurance Company vs. Kansas*, 233 U. S. 389; *Chicago B. & Q. Railroad Company vs. McGuire*, 219 U. S. 549; *Erie Railroad Company vs. Williams*, 233 U. S. 699; *Sawyer vs. Dairs*, 136 Mass. 239.

In *Atlantic Coast Line R. R. Co. vs. Goldsboro*, 232 U. S. 548, the United States Supreme Court held that "It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abrogated nor bargained away and is inalienable even by express grant; and that all contracts and property rights are held subject to its fair exercise." See also *P. R. R. vs. Braddock*, 152 Pa. St. 116; *P. R. R. vs. Warren Railroad*, 188 Pa. St. 74; *C. M. & St. P. Ry. vs. Minn.*, 232 U. S. 430; *Long Island Water Supply Company vs. Brooklyn*, 166 U. S. 689. See also *Brown Holding Co.*, 41 Sup. Ct. Reporter, 465.

In *The Fidelity Insurance, Trust & Safe Deposit Co. of Philadelphia et al. vs. Fridenberg*, 175 Pa. 500, the principle was enunciated that "The right of a sovereign power to direct that which is for the welfare of the general public cannot be abridged by contract stipulations between individuals." And that "rights under a contract are always subject to this modification, whether within the contemplation of the parties or not at the date of the contract."

In *Contributors to the Pennsylvania Hospital vs. City of Philadelphia*, 245 U. S. 20, affirming 254 Pa. St. 392, the Court held that "The States cannot by virtue of the contract clause be held to have divested themselves by contract of the right to exert their governmental authority in matters which from their very nature so concern that authority; to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the

performance of essential governmental duties. See also *Stone vs. Mississippi*, 101 U. S. 814; *Butchers Union Co. vs. Crescent City Co.*, 111 U. S. 746; *Doughlas vs. Kentucky*, 168 U. S. 488; *Manuqualt vs. Spring*, 199 U. S. 473; *Texas and New Orleans Co. vs. Miller*, 221 U. S. 408; *City of Scranton vs. Public Service Com.*, 268 Pa. 192.

In *Leiper vs. Baltimore, Etc. Co.*, 262 Pa. 328, quoted by the Superior Court of Pennsylvania, (73 Pa. Superior Court, on page 32) the Supreme Court said:

"Where the rights of individuals under a contract which would otherwise be perfectly valid, are in conflict with the general well-being of the State the rights of individuals must give way to the general welfare. . . . "Where parties enter into a contract which relates to a matter which may subsequently be the subject of revision by the State in the exercise of its police power, their contracts whether definite or indefinite in point of time, must be held subject to the right of the State to act in regard thereto. They cannot allege that the contracts, so far as the state is concerned, are inviolable. It is not, as we have already pointed out, in the interest of the parties to the contract, or either of them, that the contract may be revised or modified, but because of the greater good resulting to the public at large . . . There seems to be no difference in principle between the case of a contract indeterminate and one that is determinate, nor is there any difference in principle between a contract with a borough, with a corporation, or with an individual."

In *Jenkins Township vs. Public Service Com.* (65 Pa. Superior Ct., page 140) the Superior Court of Pennsylvania said:

"It will be seen that the rights of contracts or otherwise received by this Jenkins Co. from the State were subrogated to the police power inherent in governments, not only by force of judicial decisions but through express constitutional direction. These so-called vested rights of contracts and property were given and properly acquired thereunder, subject to a possible exercise of the power for the public good. When so used through the public service law (which is the result of the exercise of the police power of the State) it does not offend the constitutional mandate even though the exercise may, to a certain degree, affect property rights. Though through the constitution and the public service law property may be subject to regulatory control and public service companies may not successfully urge the violation of any constitutional right, * * *.

In *Pennsylvania Hospital vs. Philadelphia* (254 Pa. St. 396) the Supreme Court of Pennsylvania in discussing the power of eminent domain which, like the police power, is an attribute of sovereignty, said:

"The constitutional inhibition upon any State law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated to a public use and compensation made therefor. Such an exertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation."

In *Bowman vs. Chicago R. R. Co.*, 125 U. S. 517, the court said:

"This court has often declared that the most important function of government was to preserve the public health, morals and safety; that it could not divest itself of that power nor, by contract, limit its exercise; and that even the constitutional prohibition upon laws impairing the obligations of contracts does not restrict the power of the State to protect the health, the morals, or the safety of the community, as the one or the other may be involved in the execution of such contracts."

See also *Cyc. Vol. 8, page 863, in Re. Rahrer*, 140 U. S. 545, *Lottery Case*, 188 U. S. 321; *Reppey vs. Texas*, 193 U. S. 504; 10 L. R. A. 135, *Hillsboro Coal Co. vs. Knotts*, 273 Federal Rep. 221; *Thornton vs. Duffy*, 254 U. S. 361; *Traux vs. Corrigan*, 42 Sup. Ct. Rep. 124.

Even though prior to the passage of the Act in question (which "is a remedial one," and therefore must be so construed as to "suppress the mischief and advance the remedy," "if it can be done by reasonable construction in furtherance of the object) (*Wright vs. Barber*, 270 Pa. 186) the contract for exemption of plaintiff in error company from liability for damages to Alexander Craig, or his heirs or assigns, that might thereafter be sustained by reason of the removal of the coal underlying lands and dwelling house of defendants in error may not have been in contravention of any statute or rule of public policy, *Atherton vs. Clearview Coal Co.*, 267 Pa. 245, nevertheless, as stated by the Supreme Court of Pennsylvania in the case last cited, "Were it a contract to exempt from liability

for damages where the negligence resulted in loss of life or permanent physical disability of the person, much might be said in support of the contention that it was against public policy."

And regardless of whether such a contract was or was not prior to passage of said Act against public policy, if involving exemption of liability where the negligence resulted in loss of life or limb, or tending to the injury of the public and general welfare, the fact remains that since the Act of Assembly in question became a law it is the public policy of the State of Pennsylvania that the owners of anthracite coal mining companies shall not so conduct their mining operations as to cause the caving in, collapse or subsidence, *inter alia*, of dwelling houses used as human habitations, under the conditions and in the municipalities in said Act described.

As held in *Northern Central Ry. Co. vs. Walworth*, 133 Pa. 267, "The public policy of a State is certainly indicated by its legislation. . . . In *Carpenter's Estate*, 170 Pa. 203, we said, 'How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion.' There can be no public policy which controverts the positive language of a statute. In *Van Staden vs. Central R. R. Co.*, 178 Pa. 267, we said, 'The public policy of a State is to be deduced from the general course of legislation and the settled adjudications of its highest courts,' and as held in *Enders vs. Enders*, 164 Pa. 266, 'Public policy, in the administration of the law by the courts, is essentially different from what may be public policy in the view of the legislature. With the legislature, it may be, and often is, nothing more than expediency. The public policy which de-

that an enactment of a law is determined by the action of the legislature and 'if, by well settled judicial precedent, the law has determined that such a contract as this tends to the injury of the public, or is inconsistent with sound morality, we would not hesitate to follow the law thus declared, without regard to our own notions of the tendency of the contract.'

There can be no question but that the legislature has the "right to declare the public policy of the State," *Widdell vs. Faxon*, 8. R. Co., 100 Pa. 385, and it is a well established principle of law, as held in *Edwards vs. Child*, 113 Pa. 345, that "in enforcing a policy in the interests of the whole public, the law takes but little note of the conduct of the immediate parties to the contract," and that "contracts which have for their subject matter any interference with the creation of law or their due enforcement are against public policy and therefore void." And the court is not even able to approve the principle that "the interests of the public" require "that there shall be some restrictions on the freedom of parents to enter into contracts; and if an agreement binds a party to do or not to do anything, the doing or omission of which is manifestly injurious to the public interests, the courts must declare it contrary to public policy, and therefore illegal and void." 9 Cyc. 655-6.

The Supreme Court of the United States has many times approved the doctrine enunciated in the case of *Ferryman vs. Railroad Co.*, 100 Pa. 385, that "uncompensated expropriation is a regulation enacted for the public welfare or safety, under the police power of the State is not taking property without the compensation, and any injury sustained in sleeping and expropriation is not deemed illegal, tortious, and

such requirement is not in violation of the constitutional inhibition against the impairment of the obligation of contracts."

III.

THE KOHLER ACT DOES NOT DEPRIVE COAL COMPANY OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Defendants in error respectfully contend that the Kohler Act does not take from plaintiff in error the coal underlying the former's dwelling house and human habitation or any part thereof, but simply provides that the operation of mining and removing the same shall be conducted in such a manner as not to cause the caving in, collapse, or subsidence *inter alia* of said dwelling house and human habitation.

The State of Pennsylvania has not condemned nor appropriated in legal contemplation for public or private use any part of the coal underlying the land or human habitation of defendants in error, only a comparatively small portion of which land is occupied by dwelling house and human habitation of defendants in error, but, in the interest of the public welfare, and to provide for the personal safety and security of its citizens, has ordained that the plaintiff in error, and other anthracite coal mining companies, shall so use their property underlying the surface as not to create conditions that have proven to be not only extremely dangerous but disastrous and hurtful to society, and exceedingly inimical to the public good, in the territory described in said legislation.

The property right affected by the statute is not ownership, but use of the material thing; the right to mine it out. Nor does the State take that right for public use. The Act does not transfer the right to mine out the coal from the owner to someone else, for the public benefit, but prohibits that right being exercised by anyone; that is, destroys it, to prevent a possible calamity, to wit: Destroying the life or inflicting permanent physical injury upon defendants in error or members of their household, or others rightfully or wrongfully in their dwelling house or human habitation, and to protect the lives and property of that class of the general public and promote the general welfare in the communities of said Act described. The Kohler Act does not authorize the taking of property for public or private use; is not in exercise of the right of eminent domain, and therefore is not unconstitutional because of failure to provide compensation; but it regulates the use of tangible property, the coal underlying the dwelling house and human habitation of defendants in error by requiring the plaintiff in error to use it (negatively by leaving it unmined if necessary) as not to injure the right of others or the public welfare, or in another aspect of the case does not affect tangible property at all, but destroys an intangible property right (and it is immaterial whether it is called in litigation between or among private parties the "Third Estate" or not) that of mining out the coal underlying the human habitation of defendants in error, in the interest of the public safety. In either case it is an exercise of the police power justified by the conditions and circumstances and said Act therefore is not violative of either the State or Federal constitution.

As held in *Penman vs. Jones*, 266 Pa. 424, and many other cases decided by the Supreme Court of Pennsylvania the law gives to the owner of the sur-

face as a proprietary right at common law the right to subjacent support of his land in its natural condition as a result of and as an incident of that ownership. The right of support is a natural right of property which is inherent in such a state while in the conveyance of coal it is thoroughly settled that the right to remove it without liability for damage to the surface is not a fundamental or necessary incident. His estate in the coal, like that of the owner of the surface is governed by the maxim *sic utere tuo ut alienum non laedas*. In other words, the right to mine coal may be a right incidental to the ownership of coal property but as held by the Supreme Court of Pennsylvania in *Chadwick v. Coleman*, 80 Pa. 81, and other cases, the destruction of surface is in no way incidental or necessarily connected with or appurtenant to coal mining. An owner of the mineral estate as separated from the surface estate has no right to let down or disturb the surface estate unless said right has been explicitly acquired by contract and when so acquired by contract, said right must yield to legislation in the interest of the public good and general welfare. (See also *Thompson v. Pennsylvania Coal Company*, Vol. 1 *Luzerne Legal Observer*, 25.)

In the case of *Plymouth Coal Company vs. Commonwealth of Pennsylvania*, 232 U. S. 531, the constitutionality of Section 10 of Article 2 of the Anthracite Mining Act of June 2, 1891, P. L. 176, which provides that "It shall be obligatory on the owners of adjoining coal property to leave, or cause to be left, a pillar of coal in each seam or vein of coal worked by them, along the line of adjoining property," etc., and which was also passed for the protection of human life and property, was attacked upon two grounds, (1) because it was said to violate Section 10 of Article 1 of the

Pennsylvania constitution, which provides that private property shall not be taken or applied to public use without authority of law and without just compensation being first made or secured; and (2) because it was claimed to be in conflict with the Fourteenth Amendment to the Federal Constitution, which provides that "No State shall deprive any person of life, liberty or property without due process of law," and the Supreme Court of Pennsylvania held that the passage of said Act was a valid exercise of the police power of the State; that it was justified by the circumstances and did not violate the Fourteenth Amendment of the Federal Constitution as a deprivation of property without due process of law, nor Section 10 of Article 1 of the Constitution of Pennsylvania, which provides that private property shall not be taken or applied to public use without authority of law, or without just compensation being first made or secured.

As the case last cited and the authorities therein referred to clearly sustain, in the opinion of defendants in error, the right of the State of Pennsylvania in the exercise of its police power to pass the regulatory measure in question and authoritatively and conclusively determine some of the constitutional questions involved in this law suit, defendants in error quote at some length from the opinion of the lower Court therein, which was affirmed by the State and Federal Supreme Courts, as follows:

"Both the right of eminent domain and the police power of the state are attributes of sovereignty. They are inherent rights of the supreme power, founded upon the social compact and essential to any form of government."

"In our jurisprudence the right of eminent domain is defined to be 'the power of the state to apply private property to public purposes on payment of just compensation to the owner:' 10 *Am. & Eng. Ency. of Law* (2d ed.), 1047. The provision for compensation, however, is no part of the power itself but a limitation upon its use imposed by the constitution: *United States v. Jones*, 109 U. S. 513 (3 Sup. Ct. Repr. 346).

"'The police power of the state,' says Judge Orlady in *Com. vs. Beatty* 15 *Superior Ct.* 515, 'is difficult of definition, but it has been held by the courts to be the right to prescribe regulations for the good order, peace, health, protection, comfort, convenience and morals of the community, which does not encroach on a like power vested in congress or state legislatures by the federal constitution, or does not violate the provisions of the organic law; and it has been expressly held that the fourteenth amendment to the federal constitution was not designed to interfere with the exercise of that power by the state (Citing *Powell vs. Penna.*, 127 U. S. 678 (8 Sup. Ct. Repr. 992, 1257); *Powell vs. Com.*, 114 Pa. 265). Its essential quality as a government agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large. The principle that no person shall be deprived of life, liberty or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the states at the time of the adoption of the fourteenth amendment; and it has never been regarded as incompatible with the principle, equally vital, because equally essential to the peace and safety of

society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community (citing *Boston Beer Co. vs. Mass.* 97 U. S. 25) * * * * (at Page 17).

The State still retains an interest in his (the wage earner's) welfare, however reckless he may be. The whole is no greater than the sum of all its parts, and when the individual health, safety and welfare are sacrificed, the State must suffer. This declaration was adopted by the United States Supreme Court in *Holden vs. Hardy*, 169 U. S. 366 (18 Sup. Ct. Repr. 383) invalidating a state statute which limited the employment of men in underground mines, smelting works, etc., to eight hours a day.

"The point we desire to emphasize here is that, to be a valid exercise of the police power in the interest of the public safety, a statute need not necessarily be applicable to the whole body of the general public but may affect a specified class only."

"The police power is distinguished from the right of eminent domain in that the state, by exercising the latter right, takes private property for public use, thereby entitling the owner to compensation under the constitution, while the police power founded as it is on the maxim, '*sic utere tuo ut alienum non laedas*' is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, it is not taken for public use, but rather destroyed in order to conserve the safety, morals, health or general welfare of the public, and in neither case is the owner

entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general (and, in this case, also the specific) benefits resulting from the exercise of the police power: 22 *Am. & E. Eng. Ency. of Law* (2d ed.) 916, and cases there cited. For example, in the case at bar, the state does not take the coal in the barrier pillar and convert it to a public use, but leaves it in the ownership and possession of the adjoining mine owners. The coal itself is not taken. The property right affected by the statute is not ownership, but use, of the material thing, the right to mine it out. Nor does the state take that right for public use. The act does not transfer the right to mine out the coal from the owner to some one else, for the public benefit, but prohibits that right from being exercised by anyone—that is, destroys it, to prevent a possible calamity, to wit, the flooding of mines, and to protect the lives of that class of the general public whose safety would be thereby endangered, and incidentally, to conserve the mine property of the owners themselves. In this latter aspect of the case the destruction of the right to mine the coal bears some analogy to the destruction of buildings to prevent another sort of calamity, a conflagration. True, in the latter case, the disaster is imminent, while here it is uncertain; so that perhaps a closer analogy in that respect would be the statute law requiring fire escapes to be placed on certain structures in order to avert a possible catastrophe. Such laws were held to be a valid exercise of the police power of the state in *Fidelity Insurance Trust & Safe Dep. Co. vs. Fridenberg*, 175 Pa. 500, 507, 508."

"The enactment here in question does not authorize a taking of property for public use, is not an exercise of the right of eminent domain, and, therefore, is not unconstitutional, because of failure to provide for compensation; but it regulates the use of tangible property the coal in the pillar by requiring the owner to use it (negatively by leaving it unmined) as not to injure the rights of others, or in another aspect of the case, does not affect tangible property at all, but destroys an intangible property right (that of mining out the pillar coal) in the interest of the public safety. In either case it is, in our opinion, an exercise of the police power, justified by the circumstances and not violative of either the state or federal constitution."

In the language of the United States Supreme Court in *Holden vs. Hardy*, 169 U. S. 366, 393, "While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary prior to adoption of Constitution for the protection of the operatives, but in the vast proportions which these industries have since assumed it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers."

If as held by the Supreme Court of the United States in the case of *Plymouth Coal Co. vs. Pennsylvania, Supra*, the State of Pennsylvania in the exercise of its police power had the lawful right in the interest of humanity and to secure the safety of workmen employed in anthracite coal mines, as well as to protect property connected therewith, to require adjoining anthracite mine owners to leave a barrier pillar of coal between their workings, it certainly had the right in the interest of humanity and the safety of its citizens to be affected thereby to say through the Act of Assembly in question that it shall be unlawful for an anthracite mine owner to so conduct his or its mining operations as to cause the caving in, collapse and subsidence of a dwelling house in a populous community while used as a place of human habitation.

In the barrier pillar case hereinbefore cited the law prohibits the mining of the coal of which said pillar is composed by an anthracite coal mine owner unless the inspector and engineers after due examination of the premises and consideration of the subject, determine that none is needed to secure the safety of the men employed in either mine in case the other should be abandoned and allowed to fill with water, and in the mine cave case, the case at bar, the law simply renders it unlawful for an anthracite mine owner to so conduct his or its mining operations as to cause the caving in, collapse or subsidence of a dwelling house used as a human habitation in the designated municipalities, without reference to what quantity of coal may or may not be removed from said coal mine consistently with said purpose and without reference to whether the burdens imposed by said Act and designed to promote the safety and welfare of the public at large shall be met by leaving sufficient natural or artificial

subjacent strata to avoid a violation of the terms thereof.

In the last cited case the law expressly required the coal company, unless said requirement was dispensed with by the tribunal therein designated, to leave in place undisturbed in its natural state on every boundary line of its coal property for barrier pillar purposes some coal of an undefined quantity, depending upon the width of the pillar, but in the case at bar the law does not expressly require any quantity of coal to be left in place; and in very many instances by reason of the character of the strata overlying coal veins all of the coal may be removed without endangering or disturbing the surface, and in very many other instances by substituting a certain amount of inexpensive artificial support (by way of flushing, rock and concrete pillars, etc.) all of the coal may likewise be removed without in any way destroying life or property or injuriously affecting the well-being of the community or state. To provide for the removal of said coal under such circumstances without endangering life or seriously disturbing the surface (if an intelligent commission deems proper) the Fowler Law was passed.

In the case of *Commonwealth ex rel Williams vs. Bonnell*, 8 Phila. 534 (also a Luzerne County, Pa., case), in which was considered the constitutionality of an Act of the General Assembly of Pennsylvania entitled, "An Act providing for the health and safety of persons employed in coal mine, approved March 3, 1870, P. L. 3," the court, after referring to the contention of the coal company there made that "Millions of capital, it is urged, invested here in good faith under former laws, must remain unproductive for months, and thousands of laborers must suffer in idleness, with

hunger and want across their very hearthstones already, if the sole attention of operators must be given to strict compliance with the said Act," said, *inter alia*, that "If the Commonwealth of Pennsylvania, through her legislature, can police our towns and cities, why may she not police the coal mines within her borders? If through her legislature she can attach conditions, rules and regulations, which are to be observed by her citizens in the use of their own peculiar property, what is there about coal mines, or the owners thereof, that should specially exempt them from her supervision and control? If she recognizes, almost as a part of her organic law, applicable to the property of her citizens, the rule, long ago grown into a maxim, *sic utere tuo ut alienum non laedas*, why may she not make it equally applicable to the lives of her citizens? The Act, as we view it, is nothing more nor less than a mandate to the operators of coal mines, that they shall so work as not to injure the health, nor endanger the lives of persons employed in and about them. Of its constitutionality we have not the slightest doubt. It stands upon the statute book, known of all men, as the offspring of 'Avondale.' Of its propriety and its necessity the law-making power was taught not a moment too early. And we may say, now, that had its provisions been faithfully observed by the operators, or stringently enforced by the officer whom it called into existence, there would have been in all human probability, twenty more living, industrious, producing human beings, and fifty less widows and orphans in 'West Pittston' than there are today."

In the case of *Plymouth Coal Co. vs. Pennsylvania*, *supra*, the Supreme Court of the United States said that "It must be remembered that this tribunal (the tribunal referred to being the engineers and mine

inspector by whom the width of the barrier pillar was required to be fixed) is to settle *not a private property right but a matter affecting the public safety* "and if the State of Pennsylvania has the right through its legislative agency to provide police regulations such as the Act of March 3, 1870, P. L. 3 and of June 2, 1891, P. L. 176, hereinbefore referred to, and other similar legislation, in the interest of the health and safety of persons employed in and about anthracite coal mines in Pennsylvania, and in order to accomplish the purposes of said Act, has the right to prescribe and designate the manner in which, and the persons under whose supervision the operations therein are to be conducted and carried on; has not that same Commonwealth the right to regulate, in other respects, the mining operations of the same anthracite coal mines, otherwise governed by existing laws exclusively and peculiarly applicable thereto, and direct, as it has directed in the Act of Assembly in question, that said operations shall not be carried on in a manner dangerous to and destructive of society and human life, and contrary to the public good and general welfare?"

In *Barrett vs. State of Indiana*, 229 U. S. 26, in which the constitutionality of an Act of Assembly regulating the width of mine entrances or gangways in the interest of the safety of drivers and others in the coal mine the court said, *inter alia*, "that the legislatures of the states may in the exercise of the police power regulate a lawful business is too well settled to require more than a reference to some of the cases in this court in which that right has been sustained as against objections under the Fourteenth Amendment."

Gundling vs. Chicago, 177 U. S. 183.

Jacobson vs. Massachusetts, 197 U. S. 11.

McLean vs. Arkansas, 211 U. S. 539.
Williams vs. Arkansas, 217 U. S. 79.
Wilson vs. Maryland, 218 U. S. 173.
Schmidinger vs. Chicago, 226 U. S. 578.

"That the mining of coal is a dangerous business and therefore subject to regulation is also well settled. It is an occupation carried on at varying depths beneath the surface of the earth, amidst surroundings entailing danger to life and limb and has been, as it may be, the subject of regulation in the coal mining states by statutes which seek to secure the safety of those thus employed. The legislature is itself the judge of the means necessary and proper to that end, and only such regulations as are palpably arbitrary can be set aside because of the requirements of due process of law under the Federal Constitution. When such regulations have a reasonable relation to the subject matter and are not arbitrary and oppressive, it is not for the courts to say that they are beyond the exercise of the legitimate power of legislation.

Carroll vs. Greenwich Ins. Co., 199 U. S. 401.
Lindsley vs. Natural Carbonic Gas Co., 220 U. S. 61.

"The regulation of mines and miners, their hours of labor, and the precautions that shall be taken to insure their safety, health and comfort, are so obviously within the police power of the several states that no citation of authorities is necessary to vindicate the general principle. Many of these cases are reviewed in *Holden vs. Hardy*, 169 U. S. 366, in which it was held competent for a state legislature to limit the hours of labor, in mines and smelting works, to eight hours per day."

St. Louis Cons. Coal Co. vs. Illinois, 185 U. S. 203.

"A prohibition upon the use of property for purposes that are declared by valid legislation to be injurious to the health, morals or safety of the community is not an appropriation of property for the public benefit in the sense in which a taking of property by the exercise of the state's power of eminent domain is such a taking or appropriation.

"The destruction, in the exercise of the police power of the state of property used in violation of law in maintaining a public nuisance, is not taking property for public use and does not deprive the owner of it without due process of law."

Mugler vs. Kansas, 123 U. S. 623.

"The 'liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be at all times and in all circumstances wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to his own, *whether in respect of his person or his property* regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state.

"It is the duty of the constituted authorities primarily to keep in view the welfare, comfort, and safety of the many and not permit the interests of the many to be subordinated to the wishes or convenience of the few."

Jacobson vs. Massachusetts, 197 U. S. 11.

In *Daniels vs. Hilgard*, 77 Illinois 640, the Supreme Court of Illinois held that "The legislature had power under the constitution to establish reasonable police regulations for the operation of mines and collieries, and that the question whether certain requirements are a part of a system of police regulations adapted to and in the protection of life and health was properly one of legislative determination and that a court could not rightly interfere with such determination unless the legislation had manifestly transcended its province." See also *Litchfield Coal Company vs. Taylor*, 81 Illinois 590.

"The right to say when property is clothed with a public interest is vested in the legislature, *McLean vs. Arkansas*, 211 U. S. 547, it being familiar with local conditions, is primarily judge of the necessity of such enactments. In *Clark vs. Nash*, 198 U. S. 361, it was ruled "that what is a public use may frequently and largely depend upon the facts surrounding the subject."

"The right of the legislature under legislative authority to regulate one trade or business and not another is well settled as not denying the protection of the laws. Local legislative authority, and not the courts, are primarily the judges of the necessity of the local situation calling for police regulation, and the courts can only interfere when

such regulation arbitrarily exceeds a reasonable exercise of authority."

Schmidinger vs. City of Chicago, 226 U. S. 578.

In *Rosenthal vs. New York*, 226 U. S. 260, the court held that "Prohibition of the Fourteenth Amendment against abridgement of privileges or immunities of a citizen of the United States relates only to such privileges and immunities as pertain to citizens of the United States as distinguished from state citizenship."

In *William Wenham vs. State of Nebraska*, 58 L. R. A. 825, the court said "All property is held subject to rules regulating the common good and the general welfare of our people. This is the price of our civilization and of the protection afforded by law to the right of ownership and the use and enjoyment of the property itself. Due process of law is process according to the law of the land. This process in the states is regulated by the law of the state." See also *Walker vs. Sauvinet*, 92 U. S. 90, 48 L. R. A. 554.

In *Booth vs. State*, 1915, B., L. R. A. 420, 100 N. E. 563, the court held that "a law requiring mine owners to provide wash houses for employees does not deprive owner of property without compensation and is constitutional. It rests solely within its legislative discretion inside the limits fixed by the constitution to determine when public safety or welfare requires the exercise of the police power. Courts are authorized to interfere and declare a statute unconstitutional only when it conflicts with the constitution. With wisdom, policy, or necessity of such an enactment they have nothing to do. *Walker vs. Jameson*, 28 L. R. A. 697. The Act does not contravene any of the provisions of the constitution of the United States or the state."

In *Sawyer vs. Davis*, 136 Mass. 239, the Court said that "Nothing is better established than the power of the legislature to make what are called police regulations, declaring in what manner property shall be used and enjoyed and business carried on, with a view to the good order and benefit of the community even though they may to some extent interfere with the full enjoyment of private property, and although no compensation is given to a person so inconvenienced." *Bancroft vs. Cambridge*, 126 Mass. 433-441. In most instances, the illustrations of the proper exercise of this power are found in the rules and regulations restraining the use of the property by the owner in such a manner as would cause disturbance and injury to others." (See also *Erie R. R. vs. Com.*, 254 U. S. 394.)

"It is accordingly held in many cases, and is now a well established rule of law, at least in this Commonwealth, that the incidental injury which results to the owner of the property situated near a railroad, caused by the necessary noise, vibration, dust and smoke from the passing trains, which would clearly amount to an actionable nuisance if the operation of the railroad were not authorized by the legislature must, if the running of the trains is so authorized, be borne by the individual, without compensation or remedy in any form."

It is therefore clear that the Kohler Act is a proper police regulation and does not deprive the plaintiff in error of any of its property without due process of law and as held in *Lawton vs. Steele*, 152 U. S. 133-140, "While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so a

good deal must be left to its discretion in this regard and, if the object to be accomplished is conducive to the public interests it may exercise a large liberty of choice in the means employed." (See also *Shelby vs. Cleveland Power Co.*, 155 N. C. 196-201; *Village of Atwood vs. Otter*, 296 Ill. 70-81, 192 N. E. 573-577; *Block vs. Hirsh*, 256 U. S. 135-155; *Marcus Brown Holding Co. vs. Feldman*, 256 U. S. 170-198; *Stafford vs. Wallace*, 42 Sup. Ct. Repts. 397-401.

In the case of *Ex parte Kelso* 147 California 609, in which the Supreme Court of California declared invalid an ordinance of the City of San Francisco absolutely prohibiting the removal by the owner of any rock or stone contained in his stone quarry, the court said, *inter alia*, "Such a prohibition might be justified if the removal could not be effected without improperly invading the rights of others" . . . as "the use to which a man may put his property may be restricted or regulated by the state in the exercise of its police power so far as may be necessary to protect others from injury from such use." "While in the exercise of its police power the state may limit or regulate the use and such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. It may be that such regulations of the work as will be upheld as a proper exercise of the police power will entail such cost as will in many cases make it unprofitable to remove the rock or stone, or the rock or stone may be so situated as to make it impossible to extract it at all without violating the regulations; but if this be the effect of proper regulations, the property owner cannot complain, for he holds his property subject to the proper exercise of the police power of the state.

IV.

THE KOHLER ACT IS A BONA FIDE EXERCISE OF THE POLICE POWER AND DOES NOT DENY TO COAL COMPANY THE EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Defendants in error respectfully contend that said Act of Assembly is constitutional, and a proper police regulation for the protection of human life and the general welfare in those populous communities of the Commonwealth of Pennsylvania which have so long suffered collectively, and as important component parts and agents of a sovereign state, industrially, educationally, religiously, officially, socially, economically, financially, and by the loss by permanent physical injury and death of its citizens, as a result of what is generally known as the anthracite mine cave evil; that the most important function and first duty of our state government is to protect the health, lives, limbs, personal safety and security, as well as property and general welfare of its citizens; that a blow at the personal security and safety of the members of one home, and place of human habitation in the state, is a blow at the personal security and safety of the members and integral parts of every home and place of human habitation in the commonwealth; that an assault upon the humblest family circle or human habitation in our great state puts in peril the great principles of security and safety which lie at the foundation of our government; and for these reasons the State has a justly profound interest to be manifested, when necessary, by the exercise of its police powers, in the preservation of the personal security and safety of society, and in the pro-

tection of the body politic against violence, whether said violence is inflicted through the instrumentality of a mob, or an anthracite coal mine cave.

It is a matter of common knowledge that great loss of life and irreparable damage and uncompensated loss of property have attended the unregulated and unrestricted conducting and carrying on of the business of anthracite coal mining in the populous communities of the Commonwealth of Pennsylvania that are located in those portions thereof in which said operations are conducted; and it is incontrovertible that if plaintiff in error company and other anthracite coal mining companies are permitted to continue their unregulated and unrestricted manner of anthracite coal mining, independent of said Act of Assembly or the effort of the Commonwealth thereby to protect the lives of its citizens against the ravages resulting from and caused by the rapacious and ruthless manner in which said coal mining business has been, and is now being conducted, still further loss of life and destruction of human habitations, churches, schools, hospitals, theatres, hotels, railroad stations, public buildings, factories, stores and other industrial and mercantile establishments in which human labor is employed, will inevitably ensue.

The disasters that have occurred as a result of the reckless and unregulated manner in which said anthracite coal mining business has been conducted and prosecuted, and the inevitable necessities of the situation that have been caused thereby, produced said Act of Assembly.

The conditions and exigencies that have arisen in the development and prosecution of the anthracite coal

mining industry that have necessitated the passage of laws to protect the lives of those employed in said operations underground, are analogous in some respects to the conditions, exigencies, and necessities that have arisen in the extensive expansion of said industry, and the resultant loss of life and injury to the general welfare, that now necessitate the enactment of police regulations to provide for the personal safety, security and well being, of human beings as members of society, and comprising populous communities on the surface of lands beneath which said operations are located and carried on.

In other words, what a sovereign state may do to protect those engaged on, or beneath the surface, as operatives of a coal mining company, from the dangers incident to its operations and their employment, it may also do to protect the lives and limbs, as well as property, of those not in the employ of said companies, while on the surface, as against the dangers incident to and connected with the manner of mining their coal and operating said coal mines.

And that the State of Pennsylvania had the legal right in its own way to provide a measure such as the Act of Assembly in question for the purpose of safeguarding the lives and general welfare of the people of those populous communities affected by the unregulated and unbridled operations of anthracite coal companies, there can be no doubt.

In *West River Company vs. Dix*, 6 Howard, 507, the Supreme Court of the United States held that "In every political sovereign community, there inheres necessarily the right and duty of guarding its own existence and of protecting and promoting the interests and welfare of the community at large. This

power and this duty are to be exerted not only in the highest act of sovereignty and in the external relations of government; they reach and comprehend likewise the interior polity and relations of social life which should be regulated with reference to the advantage of the whole society," and as stated by the court in *Holden vs. Hardy, supra*, "There is nothing in Magna Charta rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted."

In other words, the common law is not a cold, immovable, unchangeable incrustation, cramping, curbing and deforming all the developments of life and holding humanity to the condition in which it existed centuries ago, treating mankind as endowed with no law of development and making no room for such development, but it is a living organism which expands with the development of society, keeps pace with its progress, and while it looks with no particular favor on innovations or change, nevertheless takes up and appropriates to its own life whatever experience, reason, necessity, or practice demonstrates to be for the common good and general welfare.

When the State of Pennsylvania through its properly constituted governmental departments and agencies became convinced that the manner in which the anthracite coal mining companies were conducting their business in populous communities within its territorial limits was destructive of society therein; subversive of the peace, safety and good order of said

communities and inimical to the health, comfort, convenience, happiness and general welfare of the citizens and residents thereof, it had an undoubted right in the exercise of its police powers to place on the statute books for the protection of a large number of its people a law in harmony with the living, glowing and indestructible laws of their nature and in harmony with the principle of personal security underlying many of the provisions in our State and Federal Constitutions, as, for instance, the provision in Article IV of the Amendments to the Constitution of the United States, that "The right of the people to be secure in their persons, houses, etc., against unreasonable searches and seizures, etc., and a similar provision in Section VIII of Article I of the Constitution of Pennsylvania.

In the case of *Nolan vs. Jones*, 263 Pa. 124 (67 Pa. Sup. Ct. 480) the court said, "In order to serve the public welfare, the state, under its police power, may lawfully impose such restrictions upon private rights as, in the wisdom of the legislature, may be deemed expedient (*Enders vs. Enders et al., Exrs.*, 164 Pa. 266, 271); for 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community': *Mugler vs. Kansas*, 123 U. S. 623, 665. A statute enacted for the protection of the public health, safety or morals, can be set aside by the courts only when it plainly has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law. If it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination is conclusive": *Powell vs. Pennsylvania*, 127 U. S. 678, 685.

In the case of *Commonwealth vs. Crowl*, 245 Pa. 554 (52 Pa. Sup. Ct. 539) (which was affirmed by the United States Supreme Court, 242 U. S. 153) the court said, "We are not concerned with the wisdom of legislation under this power. Our only inquiry is whether the power exists. Sovereignty is in the people and is expressed through their legislative representatives by the enactment of their will into laws. Their authority is general except as restrained by the Constitution of the United States, and among legislative capacities one of the largest is the exercise of the police power. It is more easily described than defined, but that it extends to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals cannot be questioned and these objects are to be provided for by such legislation as the discretion of the lawmaking body may deem appropriate. It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will not render the Act unconstitutional. The temptation to fraud and adulteration may be a consideration leading to regulative or prohibitive legislation. If it were not so courts would become triers of the expediency of such legislation and the authority which the people committed to the legislature would be transferred by judicial action to the courts. Where a statute is clearly and palpably violative of the constitution it is the duty of the courts to declare it invalid in the respects in which it is repugnant to this supreme law, but the presumptions are all in favor of the validity of legislative enactments and the burden is on him who asserts the contrary to make it clear beyond doubt that the constitutional power has been exceeded."

In the case of *Jackson vs. Rosenbaum Co.*, 263 Pa. 158, the court said, *inter alia*, in connection with discussing the police powers of the state as applied to the party-wall system in Pennsylvania that "Every act of sovereignty which, for the public welfare, adversely affects private property, whether under the right of eminent domain or otherwise, represents, in a broad sense, an exercise of police power."

"As to party-wall Acts in general, it is stated in 20 R. C. L. 1097, 'The constitutionality of these statutes has been assailed on the ground that they authorize the taking of private property of another for private use, but they are generally upheld on the ground of (being) a valid exercise of the police power'; and this is the broad reason given in our cases for sustaining such legislation. *Hoffstos vs. Voight*, 146 Pa. 632, 535; *Heron vs. Houston* (No. 1), 217 Pa. 1, 3."

"The following, perhaps rather broadly put, statement of general principle, from *New Orleans Gas Light Co. vs. Drainage Commission*, 197 U. S. 453, 463 (citing *Chicago, Etc. R. R. Co. vs. Chicago*, 166 U. S. 226, 255) that 'uncompensated obedience to a regulation enacted for the public safety under the police power of the state, is not a taking of property without due compensation,' has relevancy here."

"It has been decided repeatedly that the Fourteenth Amendment to the Federal Constitution does not limit the police power of the states. As said in 12 C. J. 1197, 'The constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, do not limit, and were not intended to limit, the subjects on which the police

power of the state may lawfully be exerted; these guaranties have never been construed as being incompatible with the principle, equally vital, because essential to peace and safety, that all property is held under the implied obligation that the owner's use of it shall not be injurious to the community.' See cases there cited and *Chicago & Alton R. R. Co. vs. Tranbarger*, 238 U. S. 67, 76; *New Orleans Gas Light Co. vs. Drainage Commission*, 197 U. S. 453, 462; also *Nolan vs. Jones*, recently decided by us, reported in 263 Pa. 124."

"That the Acts of Assembly here in question are properly classed as valid police statutes, it is now too late to dispute (*Heron vs. Houston*, *supra*); but, even aside from this, we cannot sustain plaintiff's contention to the effect that, when absolute immediate danger to the public is not present, then all 'excuse for a taking or destruction of property without compensation is absent'; for the Pennsylvania view is not so extreme. In *Fidelity, Etc. Co. vs. Fridenburg*, 175 Pa. 500, 507, 508, a regulation requiring fire escapes on certain structures, in order to avert a possible, remote catastrophe, is treated as a valid exercise of the police power; and, in *Com. vs. Plymouth Coal Co.*, 232 Pa. 141, 150, a statutory provision that obliges owners of adjoining coal properties to leave pillars along the division line, so as to avoid possible, future dangers, is held, under the police power, not to be an unconstitutional taking of property without compensation. In *Philadelphia vs. Scott*, 81 Pa. 81, 86, we say that legitimate exercise of the police power is 'generally based upon disaster, fault or inevitable necessity'; and, as hereinbefore noted, the ever-present menace from fire, in thickly populated cities, justified and sustains our party-wall system, and the legal results which flow therefrom, on the theory of inevitable necessity."

"The fundamental principles of the common law, while liable to expansion, are in essence unchangeable, but their applicability to given conditions necessarily varies according to changes wrought by usage or statutory enactment; and, pursuing this thought, what today is a trespass, may, by development of law, not be so tomorrow. Therefore, it will not do to say (as plaintiff does), since, once upon a time, at common law, the uninvited entry upon the land of a neighbor, to build a party-wall, would have been a tort, giving rise to a claim for damages, that at the present day such an act has all the attributes of a common law trespass, except those expressly removed by statute, and, as the statute now before us does not specifically deprive plaintiff of his right to damages, that this particular attribute still adheres; for the contention overlooks the all important fact that, under present conditions, the law views an entry of this character as constituting no wrongful but a wholly rightful act. Hence, the only general principles or common law rules applicable, are those relevant to acts of the former and not of the latter character. This being so, the case cannot properly be looked at from the angle which plaintiff would have us take, but must be viewed thus: At common law, before the necessity for party-walls was recognized, for one to attempt, without leave, the construction of a wall of that character partly on the land of his neighbor would, of course, have been a trespass, upon the commission of which a right to damages immediately ensued. When, however, the necessity for party-walls in thickly populated districts was recognized, and their construction authorized and regulated, such an entry no longer constituted a trespass, and, if proceeded with according to prescribed methods, in the absence of harmful negligence, the building-owner, acting by lawful authority, could not be held answerable for conse-

quential damages. In other words, when the building-owner's act, in going upon lands of his neighbor, became lawful, different common law principles applied, under which the right to damages, that had followed in the wake of what before was a tort, ceased to exist; and thereafter no damages could be recovered for such an entry, or for lawful acts rightfully done pursuant thereto, until so ordained by the law-making power.

In the case of *Commonwealth vs. Wormser*, 260 Pa. 44, which involved the constitutionality of the Pennsylvania Act of May 13, 1915, P. L. 286, regulating the employment of minors, the Court said, "Appeal is made to the bill of rights of this State and to the Fifth Amendment of the Constitution of the United States affirming the freedom of all men and the exemption from liability of any person without due process of law. The act, it is said, deprives the employer and the minor equally of the freedom to contract and to obtain work and is, therefore, forbidden by the Constitution of this State and of the United States. The statute in question was enacted under the general police power of the Commonwealth. Its object is declared to be 'to provide for the health, safety and welfare of minors,' and it is too clear for discussion that this is an appropriate subject for legislative action not only in the exercise by the Commonwealth of its authority as *parens patriae* but also of the inalienable power to enact such laws as promote the health, morals and general welfare of the people. In determining the validity of a statute enacted under the police power the question is, does the regulation subserve a reasonable public purpose. Regulations of the affairs of a state tending to promote such an object are within the clear power of the State and should be upheld. The Constitution of the State permits the legislature to enact all laws which are not

forbidden by its letter or spirit. It is necessary, therefore, to point to some provisions of the Constitution which fairly and clearly prohibits the legislation in order to avoid its effect. A large discretion is necessarily vested in the legislature not only with respect to the welfare of the people but also with respect to the means necessary to promote it. In *Crouse's Case*, 4 *Whar.* 9, the Court held that the right of parental control was a natural but not an inalienable one; that the public had a paramount interest in the virtue and knowledge of its citizens and that of strict right the business of education belongs to it. This doctrine has not been departed from as is abundantly shown in the numerous statutes affecting the status not only of children but of adults with respect to hours of labor, the character of the employment and the education of the youth of the Commonwealth.

"The principle was fully discussed in *Com. vs. Beatty*, 15 *Pa. Superior Ct.* 5 That case involved the constitutionality of the Act of April 29, 1897, P. L. 30, regulating the employment and providing for the health and safety of men, women and children in manufacturing establishments, etc., and the power of the Commonwealth was held to be adequate to enact the legislation under consideration. The fact that legislation of this character is of comparatively recent origin is not an argument against its validity. Law is an expanding science and the social order is in a constant process of evolution. That may become an important subject of legislation in the present condition of society which was ignored or regarded a matter of little consequence in years gone by. It is too late to contend that reasonable supervision by the state of the time and conditions of service of employees of industrial establishments is a matter resting wholly on the con-

sent of the employer and the employed. Federal laws and the legislation of perhaps every state of the Union show the trend of modern thought and the popular judgment that the interest of the present and future generations demands such legal supervision as may best promote not only the individual, but the general welfare."

Article I, Section 2, of the constitution of Pennsylvania, in part provides: That "All power is inherent in the people and all free governments are founded on their authority and instituted for their peace, safety and happiness" and Article XVI, Sec. 3, of said constitution provides that "The exercise of the police power of the state shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights or the general well-being of the state."

In *Live Stock Co. vs. Live Stock Co.*, 111 U. S. 746, the Supreme Court of the United States held that "The declaration of the constitution that the police power of the state should never be abridged is merely a declaration of the common law principle, and the legislature would be equally without power to barter away the police power if this power were not in the constitution."

In Freund's "Police Power" in Section 511, the power of eminent domain and the police power are differentiated as follows: "If we differentiate eminent domain and police power as distinct powers of government, the difference lies neither in the form nor in the purpose of taking, but in the relation which the property affected bears to the danger or evil which is to be provided against. Under the police power rights of

property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or, as Justice Bradley put it, because 'the property itself is the cause of the public detriment.' From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation, while the latter on principle does not."

And in *Block vs. Hirsh*, 256 U. S. 135-155, the Supreme Court of the United States held that "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay."

In the case of *Buffalo Branch, Mutual Film Corporation, Appellant, vs. Breitingner*, 250 Pa. St. 225, it was held that "Nothing but a clear violation of the constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an Act of the legislative department unconstitutional and void. The police power of the commonwealth extends to all regulations affecting the health, good order, morals, peace and safety of society, and under it all sorts of

restrictions and burdens may be imposed, and when they are not in conflict with any constitutional principles, they cannot be successfully assailed in a judicial tribunal."

In *Reduction Company vs. Sanitary Works*, 199 U. S. 306, the court held that "Where a regulation enacted by competent public authority for the protection of the public health has a real substantial relation to that object the court will not strike it down on grounds of public policy."

"The extent and limitation upon the police power are admirably stated by Chief Justice Shaw in the following extract from his opinion in *Commonwealth vs. Alger*, 7 Cush. 53-84: "We think it a well settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law as the legislature under the governing and controlling power vested in them by the constitution may think necessary and expedient." (See also *Com. vs. Jones*, 4 Pa. Super. Ct. 362.)

In *Wilkinsburg Boro., Appel. vs. Public S. Com.* (72 Pa. Sup. Ct. page 429), "We need not at any length go into the question of what is comprehended under the term 'police power.' Such power is not confined to the protection of public health, morals and safety, but included the general welfare. * * * * * The existence of the police power is assumed, its "exercise" shall not be abridged or construed so as to permit corporations to conduct their business so as to infringe the general well-being of the state. The 'general well-being' is equivalent to 'general welfare' and embraces a wide circle of subjects, almost without limit * * * * * It seems that the framers of the Constitution had in mind that whatever other provisions there might be in the instrument, the operations of corporations should not be allowed to impair the sovereignty of the State, so as to deprive the legislature of remedying such evils as might arise, and that when such a situation presented itself as we are considering, the courts might be entirely untrammelled in preserving the rights of the State and furthering its welfare."

In *Re William G. Boyce*, 65 L. R. A. 47, the court said, "The Legislature is the free uninstructed general agent of the people free to exercise its own judgment in matters coming within the police power of the State and the power necessary to sustain the validity of the statute exists here as well as there and would exist there regardless of the command. If the power to pass the law is conceded the court cannot set it aside because it may deem the enactment unnecessary or injudicious or because the court may think that experience has proven it so, or because the court may think itself more sagacious than the legislature, and can, therefore, see more clearly that the law will retard

rather than promote progress and prosperity and will be a detriment to the common good when actually applied to human affairs and the conditions of the future."

"In this way laws are enacted to protect people from perils, from the operation of railroads, by requiring bells to be rung at railroad crossings and the slackening of speed of the trains in cities, sale of liquors is regulated to lesson the evils of the liquor traffic. In this way laws are designed and adapted to the peculiarities attending each class of business. By such different classes of persons are protected by various acts and provision. In this way various classes of business are regulated and the people protected by appropriate laws from dangers and evils that beset them; their safety is secured, health preserved, and the happiness and welfare of humanity is promoted. All persons engaged in business that may be attended with peculiar injury to health or otherwise if not regulated or controlled should be subject to the same law, otherwise the law should be adapted to the special circumstances"

**** "The discriminations which are open to objection are those when persons engaged in the same business are subject to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair the equal right which all can claim in the enforcement of the law." *Soon Hing vs. Crowley*, 113 U. S. 703; *Barber vs. Connolly*, 113 U. S. 27.

Judge Cooley says: "Whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature, in the particular case, in respect to the subject matter of the Act, the manner in which its object is to be accomplished, and the mode of enacting it, has kept within the constitu-

tional limits and observed the constitutional conditions. In any case where this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. We must assume that the legislative discretion has been properly exercised. *Cooley Const. Lim.* 6th Ed. page 220."

"It is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity, there being a strong presumption that the law-making body had intended to act within and not in excess of its constitutional authority. *Sinking Fund Cases*, 99 U. S. 700-718; *Mugler vs. Kansas*, 123 U. S. 623-661; *Knights Templars Indemnity Co. vs. Jarman*, 187 U. S. 197-205; *United States vs. Delaware & Hudson Co.*, 213 U. S. 366-407.

In *Norristown Boro. vs. Puleo*, 65 Pa. Sup. Ct. 265, the lower court, affirmed by Superior Court, said that, "The state has the inherent right to protect health, life and limb, individual liberty of action, private property and the legitimate use thereof, and to provide generally for the safety and welfare of its people" . . . that the "police power is exercised in prescribing regulations for the good order, peace, health, protection, comfort, convenience and morals of the community." The judgment of the individual "may be sound, but it must yield to the legislative mind upon the question unless he can point to some provision of the constitution that is violated. To refuse recognition of this legislative power is to make the individual judgment superior to that of the legislature." *Com. vs. Kevin*, 202 Pa. 23; *Penna. R. R. Co. vs. Ewing*, 241, Pa. 581.

If, as held by the Supreme Court in *Com. vs. Vigliotti*, 271 Pa. 10, "The police power of the sovereign Commonwealth of Pennsylvania remains unimpaired, so far as the right to protect its citizens, in its own way, from the evil effects of intoxicating liquors is concerned," said police power certainly remains unimpaired regarding its rights to protect the lives, limbs and property of its people from the evil effects of unregulated and unrestricted anthracite coal mining which has heretofore so often resulted in the loss of human life and the caving in, collapse and subsidence of dwelling houses, used as human habitations, churches, schools, hospitals, cemeteries, stores, factories, industrial and mercantile establishments and other places where human labor has been employed.

In *New York vs. Miln*, 11 Pet. 102, the court said, "We are aware that it is at all times difficult to define any subject with proper precision and accuracy. If this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering (the police power). If we were to attempt, we should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the state; whether in their public or private relations; whether it related to the rights of persons or property of the whole of the people of a state or of any individual within it and may be exercised where it is not surrendered or restrained by the Constitution of the United States."

In *Munn vs. Illinois*, 94 U. S. 113-126, the Court defines the property which is subject to police regula-

tion as follows: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." The court further said, "Looking then, to the common law from whence came the right, which the constitution protects, we find that when private property is affected with a public interest, it ceases to be *juris privati* only, which doctrine was reviewed and approved in the case of *Budd vs. New York*, 143 U. S. 157.

In *Block vs. Hirsch*, 256 U. S. 135-155, the United States Supreme Court held that "The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Insurance Co. vs. Lewis*, 233 U. S. 389; irrigation, in *Clark vs. Nash*, 198 U. S. 361, and mining in *Strickley vs. Highland Boy Gold Mining Co.*, 200 U. S. 527. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest, *Mt. Vernon-Wooberry Cotton Duck Co. vs. Alabama Interstate Power Co.*, 240 U. S. 30, 32, and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only

a private transaction may not be raised by its class or character to a public affair. See also *Noble State Bank vs. Haskell*, 219 U. S. 104, 110-111."

"By the settled doctrines of this court the police power extends at least to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not in the sense of the constitution necessarily entrench upon any authority which has been confided to the National Government."

Patterson vs. Kentucky, 97 U. S. 501.

The police "power belonged to the states when the Federal Constitution was adopted. They did not surrender it, and they all have it now. It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases. It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of the ordinary functions."

Fertilizing Co. vs. Hyde Park, 97 U. S. 659.

"The reserved power of the States to guard the health, morals and safety of their people is more vital to the existence of society, than their power in respect to trade and commerce having no possible connection with those subjects."

Bowman vs. Chicago R. R. Co., 125 U. S. 524.

"It is always a judicial question if any particular regulation of such right is a valid exercise of police power, though the power of the court to declare such regulations invalid will be exercised with the utmost caution and only when it is clear that the ordinance or law declared void passes the limits of the police powers, and infringes upon rights guaranteed by the Constitution."

"The State where the prosecution of the business, originally harmless, becomes by reason of the manner of its prosecution or a changed condition of the community a menace to the public health and safety. In other words, the right to exercise the police power is a continuing one and a business lawful today may in the future because of the changed situation, the growth of population, or other causes, become a menace to the public health and welfare and be required to yield to the public good."

And in the exercise of its police power, in the manner indicated, the Commonwealth was clearly justified by the conditions, exigencies, necessities and emergencies, existing in the populous communities of what is sometimes termed "the anthracite coal region" and as held in *Bacon vs. Walker*, 204 U. S. 811, said "power extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of the people." In the language of the Superior Court in *Scranton vs. Phillips*, 57 Pa. Sup. Ct. 633, "The continued existence and just exercise of that power are necessary to the maintenance of the life of the state, and consequently can never be abridged."

In other words, as held by the Supreme Court of Pennsylvania, in *Robertson vs. Coal Company*, 172 Pa.

566, "Our legal responsibilities grow out of the relations we sustain to each other. If it were possible for us to live in a state of absolute independence of all other persons, it would be possible for us to do as we pleased with our own without considering the natural consequences of our conduct as they might affect others. But such a state of independence cannot exist in civilized society. Our interests are so bound up with the interests of those about us that it is to the advantage of all that we should each recognize the relations we occupy towards each other and the obligations that spring therefrom. The maxim '*cui usque tunc ut alienum non laedas*' expresses this general conviction in the form of a rule of civil conduct. It is in fact 'the golden rule' applied to our business transactions, or to such of them as are within the reach of the law."

In *Keeley vs. Evans*, 271 Fed. Rep. page 824, the court held that "State legislation which in carrying out a public purpose is limited in its application, is not a denial of equal protection of the laws within the meaning of the Fourteenth Amendment if within the sphere of its operation it affects alike all persons similarly situated." *Williams vs. Arkansas*, 217 U. S. 79.

In *Weed vs. Lockwood*, 266 Fed. Rep. 792, the court said that "Some latitude must be allowed to legislative judgment in selecting the basis of community. It must be palpably arbitrary to authorize a judicial review of it and it cannot be disturbed by the courts unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched." *Mo. Kansas & Tex. R. R. vs. May*, 194 U. S. 207; *Williams vs. Arkansas*, 217 U. S. 79. The Act in question applied to all anthracite coal mines located in the municipali-

ties therein designated and classified and, therefore, cannot be said to be in conflict with Section 7 of Article 3 of the Constitution of Pennsylvania or of the provisions of Section 7, Article 3, of said constitution because of the exceptions contained in Section 6 of said Act.

In *Durkin vs. Kingston Coal Co.*, 171 Pa. 193, the Supreme Court of Pennsylvania held that the Act of June 2, 1891, P. L. 176, entitled, "An Act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania, and for the protection and preservation of property connected therewith," was not unconstitutional, as a whole, in as much as it related to all anthracite coal mines. In said case said act was attacked as unconstitutional and as local and special legislation on the following grounds, *inter alia*, to wit: "(a) Because applicable to anthracite mines only; (b) because applicable only to such anthracite mines as employ over ten men; (c) because it is a regulation of labor applicable only to miners and laborers employed in certain anthracite mines; (d) because it is a regulation of mining applicable only to certain anthracite mines," all of which objections were overruled as being untenable and without merit.

In *Holden vs. Hardy*, *supra*, the Supreme Court said, *inter alia*, "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of

laws and judicial proceedings may exist in the several states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state."

In *Middleton vs. Texas Power Co.*, 249 U. S. 152, the court said, "The burden being upon him who attacks a law for unconstitutionality the court need not be ingenious in searching for grounds of destruction to sustain a classification that may be subjected to criticism. There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that is, laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the Act might as well have extended to other classes of employment this would not amount to a constitutional objection.

See *Chicago Dock Co. vs. Fraley*, 228 U. S. 680, 681; *Louisville vs. Melton*, 218 U. S. 36; *Barber vs. Connolly*, 113 U. S. 27.

It must be conceded that there is such a substantial and genuine difference and distinction between the manner of conducting and carrying on anthracite coal mining operations and the manner of conducting and carrying on of bituminous coal mining operations as to constitutionally warrant and legally justify their separation into distinct classes with a separate system of legislation and code of laws governing each, *Durkin vs. Kingston Coal Company*, *supra*, and it is a well known

and palpably evident fact and circumstance, well within the range of common knowledge, that the disasters, calamities, catastrophes, evils and mischiefs (in the form of loss of human life and limb, and destruction of human habitations and property in populous communities from mine caves), that have resulted and will inevitably result from the unregulated and unrestricted operation of anthracite coal mines, the coal veins of which are sometimes over one hundred feet in thickness, have not resulted and cannot result from the operation in any form or manner of bituminous coal mines in which the coal vein rarely exceeds five feet in thickness.

In other words, the conditions and dangers to human life and property by mine caves, as affecting the general welfare, that are incident to, accompany and result from the presently unregulated operation of an anthracite coal mine do not exist in, and cannot be created by any form of reckless or unregulated operation of a bituminous coal mine. Even though all of the coal were removed from the workings of a bituminous coal mine, the narrowness, thinness and meagreness of the vein of coal therein so removed is such that the empty space thereby created can be readily and inexpensively refilled by supplying and substituting some form of artificial support by way of timber, or culm or rock flushing, or in the event no artificial support is so supplied (an operation often impracticable in an anthracite coal mine by reason of the great thickness, depth below the surface, location, or formation of the veins therein) no danger or loss of life or property affecting the public good or general welfare, can be encountered or suffered as a result thereof, which in its nature, character or extent can compare with the danger and loss of life and property which experience and

history have demonstrated will result, and have resulted from and have been caused by, the removal of all, or nearly all of the coal in the workings of an anthracite coal mine.

The conditions to be found and existing in each class of said coal mines are different, and radically and substantially different, and because of this always existent substantial difference and distinction between the anthracite and bituminous coal mines and the respective conditions existing therein, it was necessary to establish and enact into law a separate system of legislation to govern and regulate the manner of conducting and carrying on the operations of each.

If there is a substantial difference and distinction in point of hurtful results and in consequences detrimentally affecting the general welfare between the operation of an anthracite and a bituminous coal mine (whether said hurtful results or detrimental consequences affecting the public welfare are due to the disparity in depth or the thickness of the coal veins or the fact that there are more populous communities in the affected area of anthracite coal mine workings than are in the bituminous coal regions, or otherwise), that difference and distinction justifies a classification, for as held by the United States Supreme Court in the case of *Lindsley vs. Natural Carbonic Gas Company*, 220 U. S. 61, "A police statute may be confined to the occasion for its existence. If there is a substantial difference in point of hurtful results between various methods of pumping gas and mineral water, that difference justifies classification, and the burden is on the attacking party to prove the classification unreasonable." The court in said case also enunciated the following rules and principles of law, to wit:

1. "The equal protection clause of the Fourteenth Amendment does not take away from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary."

2. "A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."

3. "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it; the existence of that state of facts at the time the law was enacted must be assumed."

4. "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachel vs. Wilson*, 204 U. S. 36, 41; *Louisville & Nashville R. R. Co. vs. Melton*, 218 U. S. 36; *Ozan Lumber Co. vs. Union County Bank*, 207 U. S. 251, 256; *Munn vs. Illinois*, 94 U. S. 113-132; *Henderson Bridge Co. vs. Henderson City*, 173 U. S. 592-615."

"The facts or averments contained in the bill are not alone to be considered, for due regard also must be had for what is within the range of common knowledge and what is otherwise plainly subject to judicial notice. *Brown vs. Piper*, 91 U. S. 37, 43; *Brown vs. Spillman*, 155 U. S. 665-670; *McLean vs. Denver & Rio Grande R. R. Co.*, 203 U. S. 38-51; *McNichols vs. Pease*, 207 U. S. 10-111." (See also *Crescent C. O. Co. vs. Mississippi*, 42 Sup. Ct. Rep. 42.)

As stated in opinion of Justice Frazer in the case of *Com. vs. Alden Coal Company*, 251 Pa. 134, "Classification does not depend merely upon difference in the physical nature or condition of the subjects selected, but upon a variety of considerations. *Com. vs. Delaware Div. Canal Co.*, 123 Pa. 594." (See also *Silver King Co. vs. Conkling Co.*, 255 U. S. 144.)

It is well known that, in addition to the hereinbefore enumerated substantial differences and distinctions between anthracite and bituminous coal mines and the depth, location, size and character of the coal veins therein, as affecting and causing surface disturbances and subsidences by the unrestricted and unregulated operation thereof, by reason of the soft character of bituminous coal, greater regularity and uniformity in the distribution and columnization of coal pillars can be attained whether for surface protection purposes, or otherwise, than is possible in an anthracite coal mine, and also that because of the great disparity between the average depth of a vein of bituminous coal, which rarely exceeds one hundred and fifty feet, and the depth of anthracite veins of coal which often reach a depth of nearly two thousand two hundred feet, artificial support may be adequate and practicable to support the surface overlying a bituminous coal mine, while inadequate and impracticable because of the tremendous top weight in the anthracite coal mine, and this is so regardless of the greater shock and vibration that usually accompany the removal of anthracite coal, which is hard and compact, and its effect on other subjacent strata, and surface subsidence, as compared with the removal of bituminous coal, which is soft and essentially different in its physical properties and structural character.

It is also true, as appears in opinion of court in Anthracite Coal Tax Case in the Court of Common Pleas of Dauphin County, in Equity, No. 709, *Equity Docket*, No. 25, *Dauphin County Reporter* 75, that "Geography also emphasizes the difference between bituminous and anthracite coal, because where one is present the other is absent. No county in Pennsylvania produces anthracite and bituminous coal," and as stated by Justice Frazer in *Com. vs. Alden Coal Co.*, "anthracite coal is found only in a few counties in the eastern portion of this state."

Defendants in error, therefore, respectfully contend that, considering the object and purpose of the Act of Assembly in question, the differences and distinctions hereinbefore suggested are sufficient to sustain the classification, and it is to be further borne in mind, as held by the Supreme Court of Pennsylvania, in *Commonwealth vs. Delaware Division Canal Company*, *supra*, that classification is not "necessarily based upon any essential differences in the nature, or indeed, the condition of the various subjects; it may be based as well upon, . . . the impracticability of applying to the various subjects the same methods, so as to produce just and reasonably uniform results, or it may be based upon well grounded considerations of public policy."

The inevitable necessity of protecting human lives and property in the municipalities described in the Act of Assembly in question against the mine cave evil, which has become a menace to the public good and the general welfare therein, has not arisen and cannot arise except from the unregulated and unrestricted operation of anthracite coal mines. No such necessity has arisen nor can arise from the manner in which

operations have been conducted or are being conducted or carried on in bituminous coal mines, clay mines, or any other kind of underground workings, and the operations of all mines except anthracite coal mines in Pennsylvania have not and cannot become detrimental to the general welfare or a blot upon human civilization. Not so with the manner in which anthracite coal mine operations have been conducted and carried on.

And without the sovereign power of the State of Pennsylvania to protect them against the dangers and loss incident to and the destruction following in the wake of the anthracite mine cave evil some of the most prosperous, compactly built, and thickly populated towns and cities of our Commonwealth are doomed to a repetition of the calamities resulting in loss of human life and destruction of property, that have already befallen some of them, and that have occurred not infrequently at night and during the hours of repose when the unfortunate victims of asphyxiation (from severed and broken gas pipes) and other forms of death, were helpless to protect themselves against or to flee from the insidious dangers that surrounded them.

It was to this evil and to those conditions Governor Sproul had reference when in a message to the Pennsylvania legislature as recorded January 18, 1921, in the legislative journal on page 34, he said *inter alia*, "We cannot longer sit here in smug indifference to our responsibilities as officials and as citizens. The men and women of another generation will wonder what sort of folks lived in this state in the Nineteenth and Twentieth Centuries as they contemplate deserted and ruined cities, abandoned industries and a desolate wil-

derness where once were teeming communities, and realize that a little foresight might have saved, or at least mitigated such conditions," and it was to the same evil and conditions he referred when in a public statement issued by him after the passage of the Kohler Act he said *inter alia*, "Wars and pestilence and misgovernment destroyed the great cities of old. Surely in these enlightened times we must not sacrifice our communities to industrial carelessness or civic neglect, nor can we, as Americans of this day and generation, allow important parts of this God favored state to revert to the wilderness of abandon and permit splendid counties to become forsaken mining camps, unsightly and forlorn."

And though the legislative declaration of the conditions that rendered imperative the passage of the Kohler Act for the protection of the lives and property of citizens of the Commonwealth of Pennsylvania and the promotion of the well-being and general welfare of the State is not conclusive or binding upon the Courts such a declaration, as held in the case of *Block vs. Hirsh, supra*, concerning public conditions, that by necessity and duty the legislature must know, is entitled at least to great respect.

Can it be said that in the face of the conditions, exigencies and necessities of the situation as hereinbefore described, no just or reasonable basis existed to justify the classification of anthracite coal mines for the purpose of regulating the manner in which mining operations shall be conducted and carried on therein. Plainly it cannot be said that such classification rests on no reasonable basis,

V.

THE KOHLER ACT DOES NOT DEPRIVE COAL COMPANY OF ITS PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO FEDERAL CONSTITUTION.

Regarding the foregoing subject, defendants in error respectfully submit as held by the court in the case of *Mugler vs. Kansas, supra*, and other cases hereinbefore cited that "neither the Fourteenth Amendment to the Constitution of the United States, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity."

As held by the court in *Magoun vs. Ill. T. & Sav. Bk.*, 170 U. S. 283, "the Fourteenth Amendment of the Constitution of the United States only requires that 'the same means and methods' be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances. *Kentucky R. R. Tax Case*, 115 U. S. 321. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions both in the privilege conferred and the liabilities imposed. The state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion." (See also *Louisville & Nashville R. R. vs. Melton*, 218 U. S. 36.)

VI.

THE DECISION OF THE STATE COURT AS TO THE EXTENT AND LIMITATION OF POWERS POSSESSED BY COAL CORPORATION, ITS OWN CREATURE, AS AFFECTED BY THE POLICE POWER, (A LOCAL AND NON FEDERAL QUESTION) IS SUFFICIENT TO MAINTAIN THE JUDGMENT OF THAT COURT.

Defendants in error respectfully submit that the plaintiff in error corporation is a mere creature of the legislature of the State of Pennsylvania, whose powers to cave in and let down the human habitation of the defendants in error in violation of law and in disregard of the general well-being of the State are also circumscribed and limited by Section 3 of Article 16 of the Constitution of the State of Pennsylvania, which provides *inter alia* "that the exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights or the general well-being of the State," and that therefore, the decision of the Pennsylvania State Supreme Court defining the extent and limitation of the powers possessed by the plaintiff corporation, as affected by the police power, concerns a local and non-federal question sufficient of itself as such to sustain and maintain the judgment of that court in this case.

In other words, as held by the court in the case of *Berea College vs. Kentucky*, 211 U. S. 45, "The decision by a state court of the extent and limitation of the powers conferred by the state upon one of its own corporations is of a purely local nature. In creating a corporation a state may withhold powers which may

be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers, the legislature may deem that the best interests of the state would be subserved by some restriction and the corporation may not plead that in spite of the restriction it had more or greater powers because the citizen has." The granting of such right or privilege (the right or privilege to be a corporation) rests entirely in the discretion of the state, and of course when granted may be accompanied with such conditions as its legislature may judge most fitting to its interests and policy. *Home Ins. Co. vs. New York*, 134 U. S. 594-600; *Perrine vs. Chesapeake & Delaware Canal Co.*, 9 How. 172, 184; *Horn Silver Mining Co. vs. New York*, 143 U. S. 305-312. The Act of 1904 forbids "any person, corporation, or association of persons to maintain or operate any college, etc." Such a statute may conflict with the Federal Constitution in denying to individuals powers which they might rightfully exercise and yet, at the same time be valid as to a corporation created by the state."

Defendants in error respectfully contend that the question whether the plaintiff in error was conducting its coal mining business in such manner as to infringe the equal rights or the general well-being of the State of Pennsylvania, was a local or non-federal question under Section 8 of Article 16 of the State Constitution, and that the decision of the State Supreme Court in the disposition of said question was final and conclusive upon plaintiff in error and sufficient to sustain the judgment of said court independent of any federal question.

"And it has been repeatedly decided under Section 709 of the revised statutes (similar to Section 237 of

Judicial Code) that to give this court jurisdiction of a writ of error to a state court it must appear affirmatively not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it." *Brown vs. Atwell*, 92 U. S. 327; *Citizens Bank vs. Board of Liquidation*, 98 U. S. 140; *Chouteau vs. Gibson*, 111 U. S. 200; *Adams County vs. Burlington & Missouri Railroad*, 112 U. S. 123; *Detroit City Railway vs. Guthard*, 114 U. S. 183; *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S. 18.

See also *Waters-Pierce Oil Co. vs. State of Texas*, 212 U. S. 112; *Enterprise Irrig. Dist. vs. Canal Co.*, 243 U. S. 157; *Perrine vs. Chesapeake & Delaware Canal Co.*, 9 How. 172.

In its interpretation of Section 3 of Article 16 of the Constitution of Pennsylvania, hereinbefore quoted and referred to, the Superior Court of that state in the case of *Wilkinsburg Boro, appellant, vs. Public Service Commission*, 72 Pa. Sup. Ct., on page 429, said: "It seems that the framers of the Constitution had in mind that whatever other provisions there might be in the instrument, the operations of corporations should not be allowed to impair the sovereignty of the State, so as to deprive the legislature of remedying such evils as might arise, and that when such a situation presented itself as we are now considering, the courts might be entirely untrammelled in preserving the rights of the State, and furthering its welfare."

The authorities relied upon by the plaintiff in error to sustain its contention as will appear by an examination thereof do not involve the exercise by the Commonwealth of its police power but rather the power of eminent domain which latter power has no application under the facts disclosed by the pleadings and the record in this case.

Defendants in error therefore respectfully ask that the judgment of the Supreme Court of the State of Pennsylvania be affirmed.

Respectfully submitted,

W. L. FACH,

H. J. MAHON,

Attorneys for Defs. in Error.

THE KOHLER ACT.

(Pamphlet Laws of 1921, P. L. 1198-1200)

COPY.

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LEGISLATURE OF PENNSYLVANIA.

File of the House of Representatives.

No. 1157.

Session of 1921.

Introduced by Mr. Kohler, March 23, 1921.

AN ACT

regulating the mining of anthracite coal, prescribing duties for certain municipal officers and imposing penalties.

Whereas, the anthracite coal industry in this Commonwealth has been and is being carried on in populous communities in such manner as to remove the natural support of the surface of the soil to such an extent as to result in wrecked and dangerous streets and highways, collapsed public buildings, churches, schools, factories, stores and private dwellings, broken gas, water and sewer systems, the loss of human life and in general so as to threaten and seriously endanger the lives and safety of large numbers of the people of the Commonwealth, therefore,

Section 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met and it is hereby enacted by the authority of the same, That it shall be unlawful for any owner, operator, director or general manager, superintendent or other person in charge of or having supervision over any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct

the operation of mining anthracite coal as to cause the caving-in, collapse or subsidence of

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels and railroad stations.

(b) Any street, road, bridge or other public passageway dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire or other facility used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company law.

(d) Any dwelling or other structure used as a human habitation or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground.

Section 2. Every owner, operator, lessor, lessee, or general contractor engaged in the mining anthracite coal within this Commonwealth shall make or cause to be made a true and accurate map or plan of the workings or excavations of such coal mine or colliery, which shall be drawn to a scale of such size as to show conveniently and legibly all markings and numbers required to be placed thereon by the terms of this Act. Such maps or plans shall also show in detail and in markings of a distinctive color all contemplated workings which are intended to be undertaken or developed within the succeeding six months. Such maps or plans shall be deposited as often as once in six

months with the mayor in cities where such coal mines or collieries are situated. In boroughs and townships of the first class such maps or plans shall be filed with the County Commissioners of the proper county. Such maps or plans shall be considered public records and shall be open to the inspection of the public and copies or tracings may be made therefrom. No mining shall be done which is not shown on the map or plan filed at least ten days previously.

Section 3.—Every owner, operator, lessor, lessee or general contractor engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of or having supervision over any anthracite coal mine or mining operation in this Commonwealth shall be and is hereby required (a) to designate within a period of six months from the passage of this Act and to keep designated by number each and every pillar of anthracite coal beneath the surface still remaining in place at the time this Act goes into effect and all pillars thereafter created, the number of each pillar to be placed in a conspicuous position with white paint or some other equally durable and visible substance, and (b) to designate or cause to be designated by numerals of convenient and legible size upon all mine maps or plans mentioned in Section 2 of this Act, with the space on each map or plan designating any pillar of coal the number of such pillar.

Section 4. The mayor of cities, the burgess of boroughs, the boards of township commissioners of the first class and such engineers and other agents as they may employ, shall at all reasonable times be given access to any portion of any anthracite coal mines or mining operations which it may be necessary or proper to inspect for the purpose of determining whether the

provisions of this Act are being complied with and all reasonable facilities shall be extended by the owner or operator of such mine or mining operation for ingress, egress, and inspection.

Section 5. The mayor of cities, the burgess in boroughs, the board of township commissioners in townships of the first class, shall have the power to prevent the mining of anthracite coal beneath the surface in any mine or mining operation in which the pillars of coal shall not have been numbered and the numbers thereof designated by maps or tracings as provided by this Act, and where mining operations are being conducted in violation of this Act they shall have the power to prevent any miner or laborer other than those necessary for the protection of life and property, from entering the mine or mining operation until such time as the provisions of this Act have been complied with.

Section 6. The provisions of this Act shall not apply to townships of the second class, nor to any area wherein the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.

Section 7. Any owner, operator, lessor, lessee or general contractor engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of or having supervision over any anthracite coal mine or mining operation, who shall violate any provision of this Act shall be deemed guilty of a misdemeanor and upon conviction shall be sentenced to pay a fine of not more than five thousand dollars or undergo imprisonment for

not more than one year, both or either, at the discretion of the Court.

Section 8. The Courts of Common Pleas shall have the power to award injunction to restrain violations of this Act.

Section 9. This Act is intended as remedial legislation designed to cure existing evils and abuses and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose and no provision is intended to receive a strict or limited construction.

Section 10. It is hereby declared that the provisions of this Act are severable one from another and if for any reason this Act shall be judicially declared and determined to be unconstitutional so far as relate to one or more words, phrases, clauses, sentences, paragraphs or sections thereof, such judicial determination shall not affect any other provision of this Act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the validity in any respect of one or more of the provisions of this Act.

Section 11. This Act shall go into effect three calendar months after its final approval.

Section 12. All Acts and parts of Acts inconsistent with this Act are hereby repealed.

Speaker of the House of Representatives.

President pro tempore of the Senate.

Approved the 27th day of May, A. D. 1921.

WM. C. SPROUL

In the Supreme Court of the United
States.

OCTOBER TERM, 1922. No. 549.

Pennsylvania Coal Company, Plaintiff-in-Error,

vs.

H. J. Mahon and Margaret Craig Mahon.

MOTION TO ADVANCE FOR ARGUMENT.

Now comes plaintiff-in-error in the above entitled cause coming before this Honorable Court on writ of error issued and directed to the Supreme Court of Pennsylvania, by its attorneys, John W. Davis, Frank W. Wheaton, Henry S. Drinker, Jr. and Reese H. Harris, and respectfully represents:—

This is a test case to determine the constitutionality of the Pennsylvania Act of May 27, 1921, P. L. 1198, known as the Kohler Act, a copy of which is hereto annexed.

The lower Court held the Act unconstitutional. The Supreme Court, Justice Kephart dissenting, reversed and held the Act constitutional. The Attorney General of Pennsylvania and counsel representing municipalities, pub-

lic bodies and other interests, participated in the argument.

Practically all of the anthracite coal in the United States is situated in the State of Pennsylvania.

In the development of the anthracite industry it was common practice to create separate estates in the coal, the surface and the right to support, and this separation has repeatedly been recognized as proper by the Supreme Court of Pennsylvania. In cases where the surface owner acquired the right to support there has never been any question as to his power to enforce it. In many cases, however, the fee owner, in deeding away the coal, expressly released to the coal owner the right to support; in other cases, as in the case at bar, the coal company, as the original owner of the fee, sold the surface only, without the right of support, the grantee of the surface expressly releasing all right to damages for disturbance of the surface which might be caused by future mining.

In the latter class of cases the Kohler Act effected a revolutionary change in the law. It deprived the coal owner, without compensation, of his right to mine any coal which might cause damage to structures on the surface, notwithstanding the fact that, in his deed, he had expressly been given this right, the Act making it a crime, irrespective of negligence, to cause the subsidence of surface structures by anthracite mining.

It is of paramount importance that an early decision of this case be had for the following reasons:—

1. Until such decision no anthracite coal which is likely to cause surface subsidence can be mined. This involves millions of tons. One company is unable to operate six large collieries in the City of Scranton, employing more than five thousand men, and, by reason of its being shut down on this account at this time, a strike is threatened in its other collieries. This company alone anticipates a shortage of a million and a half tons a year because of the effect of this law.

2. On account of the five months' strike in the anthracite field a serious shortage of domestic fuel is threatened. It is most important that the question be promptly determined whether all this coal, which the Kohler Act requires to be kept in place, is never to be mined.

3. A Federal Commission to investigate the anthracite industry is about to be appointed under an Act which has just been passed by Congress. There should be an authoritative answer to such question while the Commission functions during the next few months.

4. The State Legislature of Pennsylvania convenes biennially, and its next session is in January, 1923. The constitutionality of this Act should be finally determined before the adjournment of the legislature, in order that supplementary legislation, now generally conceded to be necessary, may be intelligently enacted.

5. If the Kohler Act be enforced, extensive and expensive changes will be necessary in the plan of underground development in the several mines affected, which changes it is uneconomical to make until the question is finally determined, but which cannot be long deferred.

6. To pursue a plan of mining which will leave intact the coal under the protected areas will shortly so isolate many of these patches that it will become commercially impossible to go through the mined out area surrounding them to recover the coal.

7. Every year the coal companies are required to pay local taxes, aggregating hundreds of thousands of dollars, on their unmined coal, on the theory that it is of great value to them in view of the possibility of its future removal. If the Kohler Act is to stand, much of this coal will become valueless and should be exempted from taxation and taxes

Motion to Advance for Argument.

paid and accruing on it since May, 1921, refunded. Until the validity of the Kohler Act is finally determined, however, no such exemption can consistently be asked by the coal companies who are contesting its constitutionality.

Wherefore your petitioner prays that the above entitled cause may be advanced for argument.

Respectfully submitted,

JOHN W. DAVIS,
FRANK W. WHEATON,
HENRY S. DRINKER, JR.,
REESE H. HARRIS.

For Petitioner, Plaintiff-in-Error.

Service of notice of the foregoing motion is accepted and the motion concurred in.

For Defendant-in-Error.

The Kohler Act

THE KOHLER ACT.

(Act of May 27, 1921, P. L. 1198)

No. 445.

AN ACT.

Regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties.

SECTION 1. Be it enacted, &c., That it shall be unlawful Mining of anthracite coal. for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the cave-in, collapse, or subsidence of—

(a) Any public building or any structure customarily Must not cause subsidence of certain lands and structures. used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

(d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground.

SECTION 2. Every owner, operator, lessor, lessee, or Maps and plans of proposed operations. general contractor, engaged in the mining anthracite coal within this Commonwealth, shall make, or cause to be made, a true and accurate map or plan of the workings or excavations of such coal mine or colliery, which shall be drawn to a scale of such size as to show conveniently and legibly all markings and numbers required to be placed thereon by the terms of this Act. Such maps or plans

The Kohler Act

shall also show, in detail and in markings of a distinctive color, all contemplated workings which are intended to be undertaken or developed within the succeeding six months. Such maps or plans shall be deposited, as often as once in six months, with the mayor in cities where such coal mines or collieries are situated. In boroughs and townships of the first class such maps or plans shall be filed with the county commissioners of the proper county. Such maps or plans shall be considered public records, and shall be open to the inspection of the public, and copies or tracings may be made therefrom. No mining shall be done which is not shown on the map or plan filed at least ten days previously.

SECTION 3. Every owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation in this Commonwealth, shall be, and is hereby required: (a) To designate, within a period of six months from the passage of this Act, and to keep designated by number, each and every pillar of anthracite coal beneath the surface still remaining in place at the time this Act goes into effect and all pillars thereafter created, the number of each pillar to be placed in a conspicuous position with white paint or some other equally durable and visible substance; and (b) to designate, or cause to be designated, by numerals of convenient and legible size, upon all maps or plans mentioned in Section Two of this Act, with the space on each map or plan designating any pillar of coal, the number of such pillar.

SECTION 4. The mayor of cities, the burgess of boroughs, the boards of township commissioners of townships of the first class, and such engineers and other agents as they may employ, shall, at all reasonable times, be given access to any portion of any anthracite coal mines or mining operations which it may be necessary or proper to

The Kohler Act

inspect, for the purpose of determining whether the provisions of this Act are being complied with, and all reasonable facilities shall be extended by the owner or operator of such mine or mining operation for ingress, egress, and inspection.

Section 5. The mayor of cities, the burgess in boroughs, the board of township commissioners in townships of the first class, shall have the power to prevent the mining of anthracite coal beneath the surface in any mine or mining operation in which the pillars of coal shall not have been numbered and the surface thereof designated by maps or tracings as provided by this Act; and where mining operations are being conducted in violation of this Act, they shall have the power to prevent any mine or laborer, other than those necessary for the protection of life and property, from entering the mine or mining operation, until such time as the provisions of this Act have been complied with.

Section 6. The provisions of this Act shall not apply to townships of the second class, nor to any area adjacent to the surface overlying the mine or mining operation in old or unmined land, nor where such surface is owned by the owner or operator of the underlying coal and is located more than one hundred and fifty feet from any improved property belonging to any other person.

Section 7. Any owner, operator, lessee, owner, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, who shall violate any provision of this Act, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine of not more than five thousand dollars, or undergo imprisonment for not more than one year, both or either, at the discretion of the Court.

Section 8. The Courts of Common Pleas shall have power to award injunctions to restrain violations of this Act.

*The Kohler Act.*Remedial legis-
lation.

SECTION 9. This Act is intended as remedial legislation, designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction.

Construction.

SECTION 10. It is hereby declared that the provisions of this Act are severable one from another, and if, for any reason, this Act shall be judicially declared and determined to be unconstitutional so far as relates to one or more words, phrases, clauses, sentences, paragraphs, or section thereof, such judicial determination shall not affect any other provision of this act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the validity in any respect of one or more of the provisions of this Act.

When ef-
fective.

SECTION 11. This Act shall go into effect three calendar months after its final approval.

Repeal.

SECTION 12. All acts and parts of acts inconsistent with this Act are hereby repealed.

Approved—The 27th day of May, A. D. 1921.

WM. C. SPROUL

NOV 10 1922

WM. B. STAN

IN THE

SUPREME COURT OF THE UNITED STATES

No. 549.

October Term, 1922.

PENNSYLVANIA COAL COMPANY,

Plaintiff in Error,

vs.

IL. I. MAHON and MARGARET MAHON.

**Petition for Leave to Intervene on Behalf of
Appellees, to File Briefs, and to be Heard
at the Argument.**

GEORGE E. ALLEN,
*Attorney General for the Com-
monwealth of Pennsylvania.*

PHILIP V. MATTHE,
*City Solicitor, for the City of
Scranton, Pennsylvania.*

*Charles H. Mulken and Edward H. Mulken,
Attorneys for Scranton Gas & Water Co.*

OWEN J. BOHANNAN,
*for Scranton Surface Protec-
tive Association.*

IN THE
Supreme Court of the United States.

No. 549. October Term, 1922.

PENNSYLVANIA COAL COMPANY,
Plaintiff-in-Error,

vs.

H. J. MAHON and MARGARET MAHON.

PETITION FOR LEAVE TO INTERVENE ON BEHALF OF
APPELLEES, TO FILE BRIEFS, AND TO BE HEARD AT THE
ARGUMENT.

*To the Honorable the Chief Justice and the Justices of
the Supreme Court of the United States:*

The petition of the Commonwealth of Pennsylvania, by George E. Alter, Attorney General of said Commonwealth; of the City of Scranton, Pennsylvania, a municipal corporation of the Commonwealth of Pennsylvania, by Philip V. Mattes, City Solicitor of said city; Scranton Gas & Water Company, a corporation of the State of Pennsylvania; and Scranton Surface Protective Association, a corporation of Pennsylvania,

RESPECTFULLY REPRESENTS:

1. The above captioned appeal involves the constitutionality of the Act of the Legislature of Pennsylvania of May 27, 1921, P. L. 1198, known as the Kohler Act.

2. Upon the hearing of the cause in the Court of Common Pleas of Luzerne County, Pennsylvania, said Act of Assembly was held unconstitutional.

3. The present appellees took their appeal from the judgment of said Court of Common Pleas to the Supreme Court of Pennsylvania, and your petitioners asked leave to intervene in the Supreme Court of Pennsylvania, to file briefs, and to be heard orally in support of the appeal and in support of the constitutionality of said Act of Assembly. The Supreme Court of Pennsylvania thereupon made an order that your said petitioners might file briefs, and granted leave to your petitioners to present oral arguments. At the hearing of said cause in the Supreme Court of Pennsylvania, therefore, your petitioners filed briefs and were heard orally in accordance with the order of the Supreme Court of Pennsylvania above mentioned.

4. The Supreme Court of Pennsylvania reversed the judgment of the Court of Common Pleas of Luzerne County and held the said Act of Assembly constitutional, and ordered that the bill in equity filed in said Court of Common Pleas of Luzerne County should be reinstated and the relief therein prayed granted.

5. The Commonwealth of Pennsylvania is vitally interested in the sustaining of the legislative policy declared in the said Act of Assembly and in vindicating its constitutionality.

6. The City of Scranton, a municipal corporation existing under the laws of the Commonwealth of Pennsylvania, is likewise vitally interested in sustaining the constitutionality of said Act, for the reason that many anthracite coal mines are located beneath the surface comprehended in the territorial limits of said municipality.

7. Scranton Gas & Water Company is a public service corporation serving the inhabitants of the City of Scranton and is likewise vitally interested in sustaining the constitutionality of said Act.

8. Scranton Surface Protective Association is a corporation not for profit, organized and existing under the laws of the Commonwealth of Pennsylvania, of which many prominent citizens of the City of Scranton are members. The sole purpose of its organization and existence is the protection of life, health and property within the territorial limits of the City of Scranton from destruction by the caving in of anthracite mine workings, and it is vitally interested in sustaining the constitutionality of the said Act.

9. All of your petitioners are desirous of filing briefs with your Honorable Court touching the constitutionality of said Act and in support of the decision of the Supreme Court of Pennsylvania in the above cause. Your petitioners further desire that the Attorney General of Pennsylvania and one of counsel for the other three petitioners herein be permitted to present oral arguments, said oral arguments together not to exceed one-half hour in length, in support of the constitutionality of said Act.

WHEREFORE your petitioners pray that your Honorable Court will grant leave to them to file briefs as

herein set forth, and that your Honorable Court will make an order permitting the Attorney General and one other of counsel for the petitioners to present oral arguments not exceeding in the whole one-half hour in length.

And your petitioners will ever pray, etc.

COMMONWEALTH OF PENNSYLVANIA,

By *Jes. Ross Hull*
Deputy Attorney General.

CITY OF SCRANTON, PENNSYLVANIA,

By *Philip T. Mattes*
 City Solicitor.

SCRANTON GAS & WATER COMPANY,

By *Northington Scranton*
 President.

SCRANTON SURFACE PROTECTIVE
 ASSOCIATION

By *W. J. Long*
 President.

COMMONWEALTH OF PENNSYLVANIA, } ss:
 COUNTY OF *Lackawanna*

W. J. Long, having been duly sworn according to law, doth depose and say that the facts set forth in the foregoing petition are just, true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed before me
 this *3rd* day of *November*
 A. D. 1922.

J. L. Hoban
 Notary Public.

*My commission expires
 at End of next Session of Senate*

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In the Supreme Court of the
United States.

OCTOBER TERM, 1922. No. 549.

Pennsylvania Coal Company, Plaintiff in Error,

vs.

*H. J. Mahon and Margaret Craig Mahon, Defendants in
Error.*

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

STATEMENT OF THE CASE.

The question here involved is the constitutionality of the Pennsylvania Act of May 27, 1921, P. L. 1198, hereinafter referred to as the Kohler Act, a copy of which is printed at page 3a hereof.

Defendants in error, complainants below, own and occupy a dwelling house on a lot which their predecessor in title acquired from the Coal Company, in the year 1878, under a deed granting the surface only, excepting and reserving the coal and other minerals, with the right to mine therein "without objection or hindrance" by the surface grantee, and without liability for damages caused thereby, the grantee expressly assuming all risk from future mining and

waiving all claim on behalf of himself and his successors "for any injury or damage that may hereafter arise from the mining out of said coal under said lot."

It is admitted that, prior to the Kohler Act, this restriction and covenant were valid and enforceable, and would have fully protected the Coal Company both from interference by injunction and from an action for damages for disturbing the Mahon dwelling by removing the coal beneath it.

Graff Co. vs. Coal Co., 244 Pa. 592;

Kirwin vs. Del. L. & W. R. Co., 249 Pa. 98, 100;

Atherton vs. Clearview Coal Co., 267 Pa. 425.

The Kohler Act makes it a crime to cause the caving in, collapse or subsidence of any dwelling house used as a human habitation, irrespective of negligence in mining and in spite of all restrictions in the deed by which the surface owner acquired his title.

Section 1 of this Act is as follows:—

"SECTION 1. Be it enacted, &c., That it shall be unlawful for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of—

* * * * *

"(d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed."

The other subdivisions of Section 1 provide surface support for public and quasi public buildings, streets and bridges, facilities of public service corporations and cemeteries where such support has not heretofore existed because never purchased or reserved.

Sections 2 and 3 require the millwright operators to mark with white paint the pillars left to support the surface and to show them on maps filed with the municipal authorities, which maps must indicate all mining contemplated within the succeeding six months.

Sections 4 and 5 give the municipal authorities power to inspect the mines to determine if the provisions of the Act are being complied with, and further power to prevent mining in and to exclude workmen from any mine until such compliance.

Section 6 excludes from the operation of the Act workings of the second class, across existing mineral land and where the surface is owned by the coal owner and is more than 150 feet from the improved property of another.

Section 7 makes the violation of the Act a crime punishable by fine and imprisonment and Section 8 gives the courts power to enjoin violations of the Act.

Sections 9 and 10 characterize the Act as remedial, even though it is a liberal construction and declares its several provisions constitutionally independent of one another.

Section 11 makes the Act effective August 27, 1921, and Section 12 repeals inconsistent legislation.

On September 1, 1921, the Coal Company wrote Mr. and Mrs. Wilson as follows:—

"DEAR MR. AND MRS. WILSON:—You are hereby notified that the mining operations of the Pennsylvania Coal Company beneath your premises will, by September 15th, have reached a point which will then or shortly thereafter cause subsidence and disturbance to the surface of your lot.

"Although in the deed to Alexander Craig, under which you hold, we expressly reserved the right to remove the coal under your lot without liability for damages which might be caused thereby, we desire to notify you of the situation so as to enable you to take proper steps for the protection of your building and

for the safety of yourselves and the members of your household during the period when the disturbance will continue.

"Yours very truly,

"PENNSYLVANIA COAL COMPANY,

"By

"W. A. MAY,

"President."

The Mahons filed a bill to enjoin the disturbance of their dwelling which the lower Court dismissed, holding the Act unconstitutional as an impairment of the contract in the deed and as an uncompensated confiscation of the property of the Coal Company.

The Supreme Court of Pennsylvania (Mr. Justice Kephart dissenting) reversed and granted the injunction, holding the Act to be a proper exercise of the police power in regulating the mining of coal.

THE QUESTIONS INVOLVED.

There is here no question of a threatened injury to any of the public or quasi public structures protected by the Act. The only building threatened was the Mahon house, admittedly a purely private dwelling.

Nor is there any question but that the Coal Company proposed to use the most approved methods of mining, the subsidence of the surface necessarily resulting from the removal of the supporting coal.

The Coal Company does not claim the right to disturb the surface of any lot, public or private, the owner of which has the right of subjacent support. It merely seeks to exercise the right, reserved in its deed, without which the grant of the surface would presumably never have been made, to proceed with its mining operations and to secure its coal without interference by the surface owners.

The surface owners, however, are endeavoring, by means of the Kohler Act, to annul the covenant in the deed under which they claim, and to acquire from the Coal Company, for nothing, a valuable property right which their predecessor in title had expressly bargained away.

POINTS—

1. The Kohler Act impairs the obligation of the contract between the parties.

2. The Kohler Act takes the property of the Coal Company without due process of law.

3. The Kohler Act is not a bona fide exercise of the police power.

4. If surface support in the anthracite district is necessary for public use it can constitutionally be acquired only by condemnation with just compensation to the parties affected.

ARGUMENT.

1. The Kohler Act impairs the obligation of the contract between the parties.

On August 26, 1921, the Mahons were bound by a valid covenant to permit the Coal Company, which had sold to them or to their ancestor the surface rights only in their lot, to exercise without objection or hindrance by them, its reserved right to mine out all the coal, without liability to them for damages occasioned thereby, which damages had been expressly waived as a condition for the grant.

On August 27, 1921, the Kohler Act completely annulled

this covenant, by giving them the right, by injunction, to prevent such mining.

The fact that this contract was contained in a deed of conveyance does not make it any the less a contract within the constitutional protection. A deed is a contract between the parties thereto, even though the grantor is a sovereign state.

"A law annulling conveyances between individuals, and declaring that the grantors should stand seised of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected."

Fletcher vs. Peck, 6 Cranch. 87, 137.

In Ohio Trust Co. vs. Debolt, 16 Howard 416, 432 this Court held:—

"And the sound and true rule is, that if the contract, when made, was valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State, or decision of its courts, altering the construction of the law.

"When the contract is made the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed."

Gas Co. vs. Light Co., 115 U. S. 650, 671.

Clearly therefore, this Act effects an unconstitutional impairment of the obligation of contract.

2. The Kohler Act takes the property of the Coal Company without due process of law.

On August 26, 1921, the Coal Company not only owned all the coal under the Mahon lot, but also had the unrestricted right to remove it, notwithstanding that by so doing the surface and the buildings erected thereon might be injured.

On August 27th, it was deprived, without compensation, of this right and of a large portion of the coal, by being required to leave the coal permanently in place to support the surface.

Theoretically, of course, the Coal Company could mine out the coal provided it substituted artificial pillars of steel or concrete.

Practically-it could not do so since the artificial support would cost many times the value of the coal.

"Whenever the use of the land is restricted in any way or some incorporal hereditament is taken away which was appurtenant thereto, it constitutes as much a taking as if the land itself had been appropriated."

Tiedeman, *State and Federal Control of Real and Personal Property*, Page 702, Sec. 143.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not

taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasions of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Pumpelly vs. Green Bay, etc. Co., 13 Wall. 166.

"For practical purposes, the right to coal consists in the right to mine it. An order of court that the coal or any part of it must remain permanently unmined as a support to the school building practically takes such coal from defendant and vests it in the school district. It would in effect be taking of private property for public use without compensation, which the Constitution forbids."

Com. vs. Clearview Coal Co., 256 Pa. 238, 331.

If an Act would be unconstitutional which specifically required one-third of the coal to be left in place to support the surface, it is in no way saved by the subterfuge of permitting the mining, provided this does not cause the subsidence which will inevitably result, unless the Coal Company provides artificial support at a cost exceeding the value of the coal.

The theoretical right to remove the coal without disturbing the surface is, as a practical matter, no more available to the Company than was Shylock's right to take out Bassanio's heart.

As pointed out in Justice Kephart's dissenting opinion, the Courts of Pennsylvania have recognized three distinct estates in mining property:—

- (1) The right to use the surface.
- (2) The ownership of the subjacent minerals.
- (3) The right to have the surface supported by the subjacent strata.

This third right, called the Third Estate, has been recognized as so distinct from the ownership of the surface or of the minerals that it may be transferred to and held or conveyed by one who was neither the owner of the surface nor of the coal.

Penman *vs.* Jones, 250 Pa. 416;

Charnetski *vs.* Coal Co., 270 Pa. 459;

Young *vs.* Thompson, 272 Pa. 360.

On August 26, 1921, this property right, the Third Estate, was validly vested in the Coal Company.

On August 27th, the Kohler Act attempted to take it from the Coal Company and gave it to Mr. and Mrs. Mahon.

Clearly the Kohler Act thus works an unconstitutional confiscation of property.

3. The Kohler Act is not a bona fide exercise of the police power.

With the swing of the popular pendulum during recent years, the descendants of the able lawyers who, forty years ago, were employed to draft special legislation, are now employed in drafting laws to evade the restrictions of the State and Federal Constitutions.

This legislation divides itself generally into two classes.

In the first class fall those laws which are prompted by upright and public spirited progressives who, impelled by the need for the immediate adoption of the reforms which they advocate, are impatient at the constitutional restrictions on Federal and State power, and are unwilling to await the enlargement of such powers by constitutional amendment.

Examples of this class of law are the two recent Child Labor Acts.

The second class consists of laws passed at the insistence of a determined and organized minority, designed to confiscate for their benefit the rights of producers of property,

and passed by a legislature in time of political stress, in its anxiety to secure the votes controlled by the advocates of the measure.

Such a law, we submit, is the Kohler Act. To protect a complaisant public from such laws is one of the primary functions of the Courts.

It is, however, a recognized rule of judicial action that the *bona fides* of all such laws can be determined only by internal evidence. Respect for the several branches of our government, the one for the other, precludes the Courts from hearing direct evidence of the purpose of an act of legislature or of the method by which the votes for its passage were actually secured.

When, therefore, it is asserted, as it is in the case at bar, that a statute is not what the legislature sought to have it appear to be, it is necessary for those attacking its constitutionality to point, in the statute itself, to evidences thereof which, viewed in the light of the Court's knowledge of human nature and of legislative practice, are sufficient to demonstrate the position taken.

Under the present heading it will accordingly be our aim to point out the features of the Kohler Act which demonstrate that it is not, and could not have been intended as a *bona fide* effort to protect the life, health and safety of the citizens of Pennsylvania, but is in reality what this Court in *Loan Association vs. Topeka*, 20 Wall. 655 characterized as "not legislation", but "robbery under the forms of law."

It will be observed that the favored expedient of the draughtors of legislation of either of the classes to which we have alluded, is to dress up their statute in the garb of a statue properly coming within one of the recognized powers of the legislative body enacting it.

The Child Labor Acts were both really and essentially police regulations, belonging to the States and not to the Federal Government.

Although the first was garbed as the Commerce Clause and the latter wore the dress of the Taxing Power, this Court recognized in each the form of the State's Police Power and held both unconstitutional.

The Kohler Act speaks as a regulation of the mining of anthracite coal, to protect the lives and safety of the public.

It begins with a vivid preamble, from which it would appear that a considerable part of the population of Pennsylvania is in immediate danger of the loss of life and limb by being incontinently projected into unexpected abysses formed by the sudden subsidence of the surface by reason of the mining of anthracite coal.

In his dissenting opinion, however, Mr. Justice Kephart states that the actual damage to date is confined to a small portion of the City of Scranton. Anthracite mining, however, is conducted in nine counties under a surface area comprising 496 square miles.

While this preamble may possibly be regarded as the spontaneous expression by the legislature of the reasons for the passage of the Act, we call attention to the fact that an honest and valid law needs no specious preamble to bolster up its constitutionality.

Is it not an equally plausible explanation of the preamble that the framers of this Act knew full well that it was not really a police regulation and were seeking to coerce the Courts into holding it to be such merely by affixing to it a lurid label?

The Act also contains a clause emphasizing the fact that it is remedial legislation and craving for it a broad construction, which, if the Act is what it says it is, will not help it, but which if it is really a confiscatory measure masquerading as a police regulation, merely serves to emphasize this feature.

The preamble and Section 9 are the hand of Esau.
Section 1 is the voice of Jacob.

"It is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts or to use and enjoy property."

Dobbins vs. Los Angeles, 195 U. S. 223, 236.

"To justify the State in interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means employed are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals; the Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."

Lawton vs. Steele, 152 U. S. 133, 137.

Let us apply to the Kohler Act the two tests laid down in *Lawton vs. Steele*.

Does the interest of the public generally, as distinguished from the private interest of Mr. and Mrs. Mahon, require that they shall be under no necessity of removing temporarily from their dwelling while the mining under their lot is going on, or of themselves making the necessary expenditures to repair their house and to fill up the cracks in their sidewalk and lawn after the subsidence is completed, using that part of the purchase money which they saved by buying the lot without the right of support?

Are the drastic prohibitions of Section I reasonably necessary to protect the lives and safety of persons on the Mahon lot or are they unduly oppressive on the Coal Company?

(a) *The Kohler Act shows on its face that its purpose is not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few.*

The only citizens or class of citizens to whom the Kohler Act gives any substantial rights, not already possessed under existing laws, are the owners of surface rights in anthracite coal lands, in localities other than townships of the second class, who as grantees have accepted their grants of surface, presumably for a proper consideration, without the addition of the Third Estate,—that is, with a full waiver of liability for surface support and a full release of damages for injury to surface improvements caused by the removal of the underlying coal.

Surface owners who have the right of support need no Kohler Act to protect their rights, as the right of inspection of underground conditions and injunction against impairment of surface support has always been recognized and enforced.

Genuine public streets or public property where the right of support is vested in the public, as well as private property, where such support has not been sold, have been amply protected. Under the Mine Law of 1891 (3 Purd. 2555), the Davis Act (Act of July 26, 1913, P. L. 1439) (6 Purd. 6626) maps of underground workings, both past and prospective, must be filed with State Inspectors and City and Borough Mine Bureaus. Any citizen can at any time determine whether his underlying support is jeopardized. Actual inspection is always available and injunctions easily obtainable. (See *Scranton vs. Peoples Coal Co.*, 256 Pa. 332; 274 Pa. 63.) All this was true before the Kohler Act.

The only interests not heretofore fully protected both by the right to damages and to injunctive relief, were those individuals who, like Mr. and Mrs. Mahon, were owners of

surface rights merely, and whose right of subjacent support had been withheld or waived, presumably for adequate consideration, or public or quasi-public bodies who instead of condemning their streets or school buildings and thus paying for and securing the permanent support of the underlying coal, have obtained them at a bargain from parties who acquired only restricted title such as the Mahons possess. The right of such surface owners, the Pennsylvania Supreme Court has properly held, can rise no higher than that of their grantor, no matter whether the present holder be a public service corporation operating water pipes (*Spring Brook Water Co. vs. Penna. Coal Co.*, 54 Penna. Super. 380), a school district which has erected its building on a lot acquired without the right of support (*Commonwealth vs. Clearview Coal Co.*, 256 Pa. 328) or a city which has similarly acquired its streets by dedication from one who himself had no right of support (*Scranton vs. Phillips*, 57 Pa. 633).

Apart from the consideration that the lives and safety of such classes of persons and those whom they permit to come on their property need no protection other than a proper notice to remove temporarily until it becomes safe to return, it is obvious that the Kohler Act is not directed to the safety of the public, but is for the benefit solely of a particular class, whose needs in no way differ from the owners of surface over bituminous mines, iron mines or other excavations.

Neither the public health, the public morals, the public safety nor any human or public right is in any way involved.

The issue is solely one between the plaintiffs as the owners of one species of property, and the defendant as the owner of another species of property, the two species of property being so related that the defendant cannot exercise its property rights or enjoy its property in any substantial degree without jeopardizing temporarily and reparably the surface of the Mahon property.

No property right of the Mahons, however, is jeopardized.

The present contingency was specifically provided for

in the contract between the plaintiff-in-error and Alexander Craig, Mrs. Mahon's father, from whom she inherited this property:—

“And it is hereby expressly understood by the party of the second part, that the said party of the first part have before the date of this conveyance and before the date of the agreement in pursuance of which this deed is made mined coal upon and under said lot and that the said party of the second part takes said lot as the same now is with all the risks attendant therefrom and waives all claim upon the party of the first part or their successors for any injury or damage that may hereafter arise from the mining out of said coal under said lot.”

After forty years of uninterrupted enjoyment by plaintiffs of the surface without any interference or disturbance whatsoever, the defendant's mining operations have finally reached the Mahon property. The plaintiffs now, repudiating the contract of their predecessor, and relying solely on this confiscatory Act of Assembly, are attempting to secure for their own private benefit and for no public use or benefit whatever, the right to the use of the coal under their lot for its perpetual support, for which right neither they nor their grantor ever bargained or paid. They are attempting to add to their “right of surface only” the valuable Third Estate which their predecessor never acquired and expressly agreed that he did not acquire, without any compensation to defendant, and at its sole expense.

That the right of the plaintiffs which is sought to be protected by the Kohler Act is not in any sense a public right is thus clear, and it matters not that the Legislature in the Kohler Act has seen fit to profess an alleged public purpose.

While Mr. and Mrs. Mahon and certain of their fellow citizens are doubtless interested in being able to get the right of support without paying just compensation for it, the citizens of Pennsylvania are in no way therein

interested. The public interest lies on the other side, in preserving the principles of the fundamental law, in seeing to it that the obligations of contracts remain unimpaired, and that the property of no citizen is taken and transferred to another without due process of law and without just compensation.

The mere fact that there may be other individuals owning private property in the anthracite and bituminous regions who, like the Mahons, have agreed by valid contract that all the coal under their surface may be mined out without liability for support, does not make the matter one of public health, morals, safety or welfare. That there may be other private persons in a situation similar to that of these plaintiffs merely makes the Act for the benefit of a particular class of individuals, and not for the benefit of the public generally. It is only as the owner of a private surface property that a person can be within the class protected by Clause (d) of Section 1 of the Kohler Act, and no matter how many persons in their individual and private capacity may be within that class, it remains nevertheless a particular class, and the requirement for membership in the class is the ownership and use of private property.

A further feature of the Kohler Act which demonstrates that it was not enacted for the protection of the general public is that by its terms it does not apply to all those similarly endangered.

The life or safety of a surface owner is obviously subjected to equal jeopardy irrespective of whether the hole into which he falls was formed by the mining of bituminous or anthracite coal, or, for that matter, of iron ore, quartz or gravel.

The Kohler Act, however, applies only to subsidence caused by the mining of anthracite coal. We annex hereto (page 12) a tabulation of decisions by the Supreme Court of Pennsylvania (referred to by Mr. Justice Koghan in his dissenting opinion, page 85), involving litigation arising out

of subsidence to the surface caused by mining coal beneath, from which it appears, that there have been 27 well litigated cases involving litigious mining and but 25 involving antislack mining.

A further evidence that the Act is disingenuous is found in Section 5. If it were really to protect life and safety, the municipal authorities would naturally be empowered, in case of threatened subsidence, to close off the mining and areas and to compel the occupants to vacate the premises. Instead, they are merely empowered to shut up the mine and to exclude the workmen therefrom.

Further legislative evidence of the true purpose of this Act is found in the provisions of another statute, passed on the same day as the Kohler Act and connected as to its vote measures. This is the so-called *Proctor* Act discussed by Justice Hughes in his dissenting opinion but, as he observes, not referred to by the majority. A copy of it is annexed hereto (page 79).

This Act provides that every coal company hereafter organized and every foreign corporation hereafter coming into the State shall be subject to its provisions. Existing companies may decline to come under it, the reason for rejecting it being exemption from prosecution under the Kohler Act. Companies accepting the Act must pay, however, to the Wage Cost Commission created by the Act, a fee equal, on the value of their entire production, about eight million, on a production of \$2,000,000,000, and at the 50¢ rate to a total of \$1,000,000,000.

Companies subject are privileged to apply to the Commission for leave to mine the coal "located beneath a structure, highway, or other improvement of a class protected against subsidence by the provisions of" the Kohler Act, i. e., structures on land having no contractual right of support (see Section 12 of *Proctor* Act). Thereupon the Commission may issue an order permitting the mining, paying all damages thereby caused from the lands therefrom.

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levied on the coal owners, or the commission may compensate the latter, out of a small portion of this fund, for the coal left to support the surface.

Owners of property injured by anthracite mining either in the future or *during the six years preceding the passage of the Act* are permitted to file claims with the Commission and be paid for their damage.

There could be no clearer demonstration than that afforded by the intrinsic evidence of these two interrelated Acts, that the sole design of the framers of both was to coerce the coal companies either into donating to the surface owner sufficient coal in place to support the surface, or paying him the damages which, as a means of getting a cheap lot, he had expressly bargained away.

Ingenuous as the scheme is, its true purpose is apparent, "robbery under the forms of law."

It is thus clear that the Kohler Act will not pass the first of the tests laid down in *Lawton vs. Steele*.

It is not for the protection of the safety, health or morals of the general public but solely to benefit the property rights of a favored class, the class benefited including, moreover, but a small proportion of those who would be subject to the same alleged danger, that is, those who live in certain kinds of municipalities in the anthracite producing counties.

So much for the first of the two tests in *Lawton vs. Steele*.

An application of the second brings the same result.

(b) The means adopted by the Kohler Act are not reasonably necessary for the accomplishment of its ostensible purpose, and are unduly oppressive upon individuals.

As forcibly pointed out by Justice Kephart, if the real purpose of the Legislature were to protect the lives and safety of the occupiers of dwellings over mining operations, who had no property right in the support of the surface, all that was necessary was to require that they be given adequate notice before the surface was disturbed.

To go beyond this, and prohibit the disturbance of the surface even after the surface owner has had ample time to withdraw temporarily is clearly unnecessary, and amounts to the arbitrary interference with defendant's private business and to the imposition of an unnecessary restriction upon its lawful occupation.

It demonstrates that the law is aimed not at safety but at property.

Is it necessary, in order to protect the lives, safety and health of Mr. and Mrs. Mahon, endangered solely by their refusal to remove temporarily from a place of danger, to force this Company, engaged in the production of a much needed commodity, either to leave a large amount of that commodity forever inaccessible to use by the public, or to coerce it into creating a fund to compensate surface owners not only for the future, but for six years past, for damages which they have never legally suffered, since they have already saved enough in the purchase price of their lots to make such damages good?

If in 1878, Mrs. Mahon's father had invested for her the value of the coal sufficient to support her lot, she would by now have a fund sufficient to build a long row of dwellings like that for the repair of which she does not desire now to pay.

4. If surface support in the anthracite district is necessary for public use it can constitutionally be acquired only by condemnation with just compensation to the parties affected.

There is no question but that in many cases the public interest requires that coal be left in place to support the streets, bridges, schools or other structures devoted to a genuine public use. In such cases a proper constitutional remedy is open. Let the proper support,—one third of the coal in place—for such structures be acquired by condemnation, and the coal company, which has for years paid the State Taxes on the coal, be paid for that necessary to support the surface.

No language could be more apt than that of the writer of the majority opinion in the case at bar, in delivering the opinion of the Court in an earlier case:—

“The school district in the purchase of the land expressly waived the right of surface support and perhaps unfortunately erected its building where the title to all the coal and the right to remove it was in another. So far as appears there was neither fraud nor concealment. The mining of coal is lawful; and where, as in this case, the right to surface support is expressly waived it is lawful to remove all of the coal; and it is difficult to understand how the doing of a lawful act in a lawful manner can constitute such a public nuisance as will be restrained in equity. For practical purposes, the right to coal consists in the right to mine it. An order of court that the coal or any part of it must remain permanently unmined as a support to the school building practically takes such coal from defendant and vests it in the school district. It would in effect be a taking of private property for public use without compensation, which the Constitution forbids.

“Unmined coal is real estate, and the school district under its rights of eminent domain by paying for the same can take all of the coal in question which may be necessary to support its building. Certainly the school district cannot directly take such property without compensation to the owner, neither can it do so indirectly under the police power of the Commonwealth.

“It is only in rare cases of overwhelming necessity that private property may be taken or destroyed for the public good. It may sometimes be done, for example, by the destruction of a building to stay the spread of a great fire or of a disastrous flood. But this is not such a case. And it makes no difference that other school buildings are similarly situated. If the school district of a city were to erect a system of public schools upon leased ground, you could not at the expiration of the

lease defeat the lessor's right of reentry on the ground that to do so would cause irreparable injury to the public schools. The primary obligation of furnishing adequate school buildings rests upon the district and if any are found to be without surface support, or upon leased premises, the district must under existing laws supply the deficiency, by condemnation or otherwise."

Com. *vs.* Clearview Coal Co., 256 Pa. 328, 331.

If the Kohler Act had frankly and honestly attempted to confiscate the title to the coal underlying the Mahon property and to vest it without consideration or compensation in the surface owner, the defendant would have been better off than at present under the Kohler Act, for the reason that under this statute it still retains the nominal title to the coal, which continues subject to taxation in its hands, although the Coal Company no longer has the right to mine and remove it, and although the sole available use of it has been permanently transferred to the surface owner.

In *Raub vs. Lackawanna County*, 60 Pa. Super Ct. 462, it was held that a grantor who retained title to unmined coal but without the right to mine and remove it, the use of the coal having been conveyed to the owner of the surface for the purpose of surface support, was still subject to taxation.

If the Kohler Act is constitutional and valid the Pennsylvania Coal Company might better deed to Mahon such coal as it may be necessary to leave in the ground to support the surface of Mahon's property, in order to be rid of the burden of taxation on property which it can no longer use and enjoy by mining, the only use to which as coal it can be put. Mahon, however, would not accept such a gift as a surface owner, because, if the Kohler Act is valid he already has now, at the expense of the defendant, all the benefit of ownership without the burden of taxation.

It is idle to say that the coal is not taken. As pointed out by Justice Kephart,

"Defendant's right to mine its coal on condition that it accept the Fowler Act and pay two per cent. on the value of its total tonnage, or its right to mine on spending on artificial support many times the value of the coal, are rights so obviously illusory as merely to emphasize the real purpose of the act,—to require the coal to be left for all time for the use of the surface owner."

In *Chicago, etc. R. Co. vs. Wisconsin*, 238 U. S. 491, this Court held the open upper berth law to be a confiscatory measure and not a health law, pointing out that if the lower occupant's health required the air in the entire section when no one was in the upper it would all the more require it when the upper was occupied.

Similarly it is difficult to understand how the lives of the occupants of a private dwelling are adequately protected by payment for the damage to their house out of the 2 per cent. tax levied on the Coal Companies, but inadequately by sufficient notice temporarily to vacate it.

THE AUTHORITIES.

Two decisions by this Court are primarily relied on to sustain the Kohler Act,—the *Barrier Pillar Case*, *Com. vs. Plymouth Coal Co.*, 232 U. S. 536, and the *Rent cases*, *Block vs. Hirsch*, 256 U. S. 135, 170, *Levy vs. Siegel*, U. S.

Both are clearly distinguished by Justice Kephart.

The *Barrier Pillar* provision of the *Anthracite Mine Law* of 1891 (P. L. 176, Sec. 10) requires the owners of adjoining mines to leave a pillar of coal standing between them of such width as provided by the mine inspector, the purpose of the provision being, after one of the mines is worked out and abandoned, to protect the employees in the adjoining mine from the water in the other.

This provision in no sense operates to transfer, without compensation, a permanent property right or easement from one party to another.

The compensation to each owner for the burden of maintaining the pillar on his side is found in the reciprocal benefit from the pillar maintained by his neighbor. See *Bowman vs. Ross*, 167 U. S. 548.

Furthermore, the Barrier Pillar Provision obviously has a direct relation to the lives and safety of men working in coal mines, just as have the other provisions of the same Mine Law requiring air shafts, props and gangways of a certain width, size and description. It is intended and admittedly operates as a bona fide protection to coal miners and not as a means whereby a certain class of agitators may obtain something for nothing.

The requirement on mine owner A to leave a pillar along his land line is a proper regulation for the protection of his own employees to whom he owes the duty of protection. The fact that adjoining owner B benefits by A's compulsory performance of this duty by A to A's own employees is a necessary and unavoidable incident. The primary purpose and justification of the provision is because it is a proper measure to insure performance by A to those to whom he owes the duty of protection and not because it protects the mine of his adjoining neighbor, although the provision is explainable and sustainable also as a mutual scheme conferring reciprocal benefits and burdens on adjoining owners in order to further the common development of their properties.

The restriction imposed by the Barrier Pillar Provision is but temporary and incidental; it applies to but a very small part of the coal at a point along the land line, where it may well be left in place without interfering with the operation until both mines are almost exhausted, whereupon, as the Court doubtless knows, the adjoining owners enter into an agreement to remove the pillar.

Furthermore, the Barrier Pillar restriction is reciprocal, each party being benefited exactly as much as the other, and both being thus enabled to carry on their operations with safety to their employees, and their respective mines.

The Rent Cases, it is submitted, are not authority for the proposition that a property right of one may under the police power be transferred to another without compensation, even in time of emergency. Quite the contrary.

The principle involved in these cases was, it is submitted, not the police power but that of eminent domain.

When the State regulates railroad rates, the fair return which the constitution guarantees to the stockholders is really, when analysed, the just compensation required in condemnation proceedings.

Instead of condemning a perpetual lease on the railroad with a fair rental for the stockholders and then operating the road at cost for the use of the entire public, the government allows the stockholders to operate it but requires them to serve the whole public without discrimination and permits them to net only the reasonable return to which their fair rental would have amounted.

There is thus an essential difference in kind between a safety appliance act and a rate regulation.

The one is an exercise of the police power, a prohibition of something injurious to the public, without the transfer of any property or property right of another either with or without compensation.

The other is in its essence an exercise of the power of eminent domain, involving not only the requirement that it be for the public benefit as distinguished from that of a privileged class, but also the requirement of just compensation.

Such were the Rent Laws.

These laws, passed after and in pursuance of extensive investigations by numerous commissions, presumably impartial and competent declared the existence of a temporary emergency growing out of the war, the operation of the laws being expressly limited to the two years ending November 1, 1922, unless sooner repealed. As found by the Court, the passage of the laws was prompted by the existence of monopoly of housing conditions, which was bound to continue during the limited period necessary to give effect to the law of supply and demand.

The laws provided that, during the emergency period, no tenant in possession could be ejected by his landlord, provided *he was willing to pay a reasonable rental*, and was not objectionable, the question of the reasonableness of the rental and of the personality of the tenant to be reviewed by a commission, with an appeal to the Courts. The landlord was authorized to get his house back if in good faith he needed it for purposes other than renting.

The other provisions of the Act were merely in aid of its primary scope and basis,—that in view of the emergency, the business of renting houses for dwelling purposes had temporarily arisen to such public importance as to justify the regulation of the charges applicable thereto.

The ultimate question on which the Court divided was whether, in view of the situation which both the majority and the minority found to exist, the business of renting dwellings came temporarily within the same category as railroads, hotels, water and gas companies and grain elevators.

The majority opinion disclaimed the introduction of any new principle of constitutional law; it merely held applicable a recognized rule to the admitted facts of the case.

There has never been any doubt that a railroad company can be prohibited from charging more than reasonable rates, or that it can be precluded from putting one passenger off its trains to make room for another who is willing to pay a higher fare.

There was no suggestion in the arguments or in the minority opinion that the means adopted were not necessary and appropriate to remedy the existing evil or that any other method was available to produce the same result which would be attended with less hardship to the landlords.

Nor was there any attempt by the law to require the landlord to give the use of his property for nothing, nor any thought that the tenant should get something for nothing.

All that the law did was, in view of the temporary sus-

pension of the law of supply and demand, temporarily to suspend the landlord's arbitrary right of extortion, the power to exercise which was the direct and temporary result of the national crisis.

The ground urged by the Government for sustaining the Acts was thus stated: (256 U. S. 149, 150-151).

"IV. The public interest may be protected by regulating on the basis of a reasonable charge, the compensation or rental to be paid for the use of property let into possession by the owners.

* * * * *

"The business of renting out apartments and houses under the existing circumstances discloses the same fundamental elements found in other cases where a public interest has been held to warrant the regulation of the business enjoying any statutory privilege. There is in such cases a state of virtual monopoly, or conversely stated, an absence of effective competition. The consuming public stands in a position of economic helplessness."

* * * * *

"V. The housing situation in a city like New York or Washington presents all the features of a practical monopoly, the normal competitive system has completely broken down.

"VI. The conditions are intensified by the special relations in which the District of Columbia stands to the Federal Government."

Even if it appeared that the owners of all the coal under buildings having no contractual right of support, intended presently to remove it, there would be no analogy to the conditions on which the validity of the Rent Laws was based, since there is no thought or suggestion that all the available dwellings, theatres, hotels and cemeteries are situated over such mines.

The grounds on which the majority opinion was based are shown by the following extracts from the opinions by Mr. Justice Holmes (page 154):—

"No doubt it is true that a legislative declaration of facts that are material only as a ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts."

* * * * *

(Page 155):—

"The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law."

* * * * *

(Page 156):—

"Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. *For just as there comes a point at which the police power ceases and leaves only that of eminent domain,* it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law. *Martin vs. District of Columbia, 205 U. S. 135, 139.*" (Italics ours.)

(Page 157):—

"The regulation is put and justified only as a temporary measure. See *Wilson vs. New*, 243 U. S. 332, 345, 346; *Fort Smith & Western R. R. Co. vs. Mills*, 253 U. S. 206. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

The rent laws were merely a temporary measure.

They provided reasonable compensation to the landlord; they constituted virtually a condemnation by the sovereign of the term to November 1, 1922, and a transfer of this

term to the tenant at a reasonable cost, the just compensation provided by the Constitution.

The Kohler Act, however, is a permanent provision. It transfers for all time the Third Estate,—the right to the perpetual use of this coal—in the Mahon lot from the Coal Company to private individuals and that without any compensation whatever.

In view of the two passages last quoted from Justice Holmes' opinion, it would appear that if either of the above features had been present in the Rent Laws, the majority would have agreed with the minority in denying their constitutionality.

In the Court below, counsel, in discussing the Rent Cases, contended that the justification for the Kohler Act is even stronger than for the Rent Laws, inasmuch as the latter were merely to provide housing facilities, a necessity of life, whereas the Kohler Act is to "protect life itself."

The obvious answer to this specious argument is, first, that the Kohler Act is on its face unnecessary to protect the lives of Mr. and Mrs. Mahon, and will be effective to that end only in case they neglect to take the precautions for their own protection which their restricted rights in their property demand that they shall take.

Second, there is no rule of law which entitles a State, even to protect life itself, to transfer the property of one citizen without compensation to another.

Just here comes into force the distinction between the police power and the power of eminent domain, so clearly stated in a recent Pennsylvania decision by the writer of the majority opinion in the case at bar:—

"Every act of the sovereignty which, for the public welfare, adversely affects private property, whether under the right of eminent domain or otherwise, represents, in a broad sense, an exercise of police power; but, in Pennsylvania, as well as in most other jurisdictions, whenever, in the making of public improvements, real estate, or certain other kinds of private property connected therewith, are either actually appropriated or

so affected as permanently to impair the value thereof (Iron City Auto Co. *vs.* Pittsburgh, 253 Pa. 478, 493), such instances are segregated, and for all legal purposes, in effect, classified under the head of 'Eminent Domain,' as to which there are many principles, restrictions and special constitutional rules inapplicable to police power cases in general, not the least significant of those being the right to damages for property thus taken, injured or destroyed."

Jackman vs. Rosenbaum, 263 Pa. 158, 166.

When a law not merely regulates or prohibits an owner of property from using it in such a way as to menace the safety, health or morals of the public, but goes farther and transfers the use of it to the public or some members thereof, then the law is invalid unless the owner is allowed proper compensation for such use, and that even though the necessary purpose and effect of the law is to protect life itself.

An owner of dangerous drugs may, under the police power, be restricted from selling them without a license, or without a prescription, or may even be prohibited from selling them at all.

This would constitute an exercise of the police power.

In time of epidemic it is conceivable that a State might temporarily prohibit the hoarding of essential medicines and might require physicians and druggists to sell them at reasonable rates.

Even at such a time, the druggist could not be required to dispense his medicines for nothing, or a baker his bread, and that though people were dying or starving for want of drugs and food.

If every word in the preamble of the Kohler Act were true there would still be no justification for the uncompensated transfer of the beneficial use of the supporting coal from defendant to plaintiff.

No emergency will justify the transfer of property or a tangible property right from one citizen to another without just compensation.

There is always another constitutional way open,—payment of just compensation, either by the state or by the party temporarily in such a position of helplessness as to require the state to lend him its power of eminent domain.

Under the Constitution the only purpose for which private property may be taken by the State is a public purpose, and even for such a purpose the only way in which it can be taken without compensation is by a uniform tax, in which case the taxpayer gets his proportionate benefit from the public expenditure.

In this connection, let us consider what features must of necessity be present to make the Rent Cases applicable to the law here under consideration.

Suppose the Legislature of Pennsylvania should declare that an emergency existed for dwelling houses in cities, boroughs and townships of the first class, and that injury to such dwellings by underground mining thus constituted a public menace; and should *temporarily* prohibit any mining company from injuring any dwelling, *the owner of which offered to pay the reasonable value of the underlying coal.*

In such case, if this Court was really satisfied that the emergency actually existed, and that the law was a bona fide attempt to remedy it and not an endeavor to assuage or benefit some politically persistent minority, it would be confronted with the problem presented in the Rent Cases.

The majority opinion, however, is not authority for the proposition that such a law would be valid if enacted for all time, permanently transferring the easement of support—in practical effect, the coal—from the coal owner to the surface owner, and that without any compensation or benefit whatever.

It is believed that, aside from the majority opinion in the case at bar, the reports will be searched in vain for any decision by a considerable court of last resort or any opinion by a single justice of this Court, sustaining the constitutionality of a state statute, which operates to trans-

fer a property right from one private citizen to another, without providing either for adequate compensation in cash, or for a reciprocal benefit provided by the same law.

It must be further remembered also, that it is not only the operating companies whose property is thus being taken without compensation. A very large part of them operate under leases from landlords whose royalties on the en-joined coal will be destroyed by the requirement that it must be left to support the surface.

For the purpose of further illustration let us consider the problem from the opposite angle.

Suppose the coal owners, under a great public demand for coal, succeeded in having the Legislature pass an act prohibiting surface owners having dwelling houses over anthracite coal mines, from interfering with the complete removal of the coal thereunder, even though such surface ownership had the positive right of support, never having sold it to the owner of the coal. Would such a law, taking away the right of support, the Third Estate, from the surface owner and vesting it in the coal owner be constitutional, even admitting a dire public necessity for more coal?

Granted the public need for coal and the impossibility of securing enough without pulling down the dwelling of Mr. Jones, who had the right of support, would it not be perfectly clear that if the public needed the coal, the constitutional way to get it, would be to pay Mr. Jones for the damage to his house?

During a temporary emergency it is conceivable that, by analogy to the Rent Cases, an Act might deny to Mr. Jones the assistance of the courts in enjoining the removal of his support and might restrict his damages recoverable at law to fair compensation, denying him punitive damages or damages based on his sentimental value. If such a law, however, precluded him from recovering any damages at all, could there be a doubt that it would be held unconstitutional, no matter what was the emergency?

Similarly a law ostensibly to protect the lives of miners by prohibiting the owners of the surface with full right of support from erecting heavy buildings which might cave it in, would be manifestly unconstitutional. In such case not only would the law be merely for the private protection of the employees of the particular coal owners but the means adopted would be so unnecessarily oppressive and so out of all proportion to the end to be obtained, that the Court would see in the law an attempt, under the guise of a police regulation, to deprive the surface owner of his right of support for the benefit of the coal owners. Our opponents would all agree that in either of the cases suggested the Third Estate could not thus be taken from the surface owner and presented to the coal owners, and they would ridicule any suggestion that the confiscation was not a "divesting of title to property;" or that the surface owner could at his own expense substitute artificial support and so protect himself and whatever loss he sustained would be "*damnum absque injuria*" and a mere "police regulation growing out of the public need for coal" of the "use" of the surface.

The truth is that the Kohler Act is not at all an Act regulating the mining of coal, in the sense that it is a regulation under the police power.

Whether a law is a police regulation or a condemnation statute depends not on what it is called, but on what it does,—on its effect.

A statute entitled "An Act to Regulate Mining," prohibiting coal companies from interfering with the construction of railroads across their property, would not be a police regulation because so labeled.

Could a State in regulating milling give to mill owners the right to construct dams to any height and take away the right of the owners up the stream to prevent the consequent flooding of their lands?

If the public interest required such a dam the State could properly condemn the right to flood the upper banks, but under no circumstances could it make a present to the lower owner of an easement over the other's property.

The Kohler Act is not a police regulation, first, because it operates, and when examined in connection with its twin measure the Fowler Act, was obviously intended, not for the benefit of the public but solely for that of a favored and restricted class of private citizens; second, because it is not merely a regulation of mining, but also, and primarily, a transfer of a property right, the perpetual use of a vast amount of coal in the ground, from one citizen to another.

It is not a valid exercise of the right of eminent domain because, first, it is not exercised for the benefit of the public generally, and second, because it provides no compensation whatever to the party whose property is taken.

It is a plain and flagrant case of confiscatory class legislation, masquerading under the guise of a police regulation.

Respectfully submitted,

JOHN W. DAVIS,
FRANK W. WHEATON,
HENRY S. DRINKER, JR.,
REESE H. HARRIS,

For Plaintiff-in-Error.

ADDENDA

SCHEDULE A.

Cases in the Appellate Courts due to subsidences arising from the failure to provide surface support.

BITUMINOUS COAL MINING

- Lowry *vs.* Hay, 2 Walker 239;
Barnes *vs.* Berwin, 3 Penny. 140;
Gumbert *vs.* Kilgore, 6 Atl. 771;
Allshouse's Estate, 23 Super. 146;
Reese *vs.* Ringler, 44 Super. 372;
Robinson *vs.* Boynton Coal Co., 58 Super. 176;
Monongahela R. C. C. *vs.* Hines, 64 Super. 6;
Jones *vs.* Wagner, 66 Pa. 429;
Horner *vs.* Watson, 79 Pa. 242;
Coleman *vs.* Chadwick, 80 Pa. 81;
Carlin *vs.* Chappel, 101 Pa., 348;
Williams *vs.* Hay, 120 Pa. 485;
Penn Coal Co. *vs.* Versailles Gas Co., 131 Pa. 522;
Emerson *vs.* Schoonmaker, 135 Pa. 437;
Wallace *vs.* The Jefferson Gas Co., 147 Pa. 205;
Kisler *vs.* Thompson, 158 Pa. 139;
Lewey *vs.* Fricke, 166 Pa. 536;
Pringle *vs.* Vesta Coal Co., 172 Pa. 438;
Robertson *vs.* Coal Co., 172 Pa. 566;
Youghioghenny River Coal Co. *vs.* Hopkins, 198 Pa. 343;
Pantall *vs.* Coal & Iron Co., 204 Pa. 158;
Youghioghenny River Coal Co. *vs.* Allegheny National Bank, 211 Pa. 319;
Rabe *vs.* Shoenberger Coal Co., 213 Pa. 252;
Weaver *vs.* Berwind-White Coal Co., 216 Pa. 195;
Berkey *vs.* Berwind-White Coal Co., 220 Pa. 65;
Dignan *vs.* Altoona Coal & Coke Co., 222 Pa. 390;
Kellert *vs.* Rochester & Pittsburgh Coal & I. Co., 226 Pa. 27;
Woods *vs.* Pittsburgh Coal Co., 230 Pa. 197;
Stilley *vs.* Buffalo Co., 234 Pa. 492;
Weakland *vs.* Cymbria Coal Co., 262 Pa. 403;

Hoffman *vs.* Berwind-White Coal Co., 265 Pa. 476;
 Lenox Coal Co. *vs.* Duncan Spangler Coal Co., 265
 Pa. 572;
 Hines *vs.* Union Coke Co. 271 Pa. 219;
 Alwine *vs.* Smokeless Coal Co. 271 Pa. 571;
 Wissinger *vs.* Smokeless Coal Co. 271 Pa. 566;
 Householder *vs.* Quemahoning Co., 272 Pa. 78;
 Arningkamp *vs.* Valley Smokeless Coal Co., 274
 Pa. 186.

ANTHRACITE MINING

Water Co. *vs.* Coal Co., 54 Super. 380;
 Scranton *vs.* Phillips, 57 Super. 633;
 Alexander *vs.* Conlon, 72 Super. 1;
 Mine Hill, etc., *vs.* Lippincott, 86 Pa. 468;
 Scranton *vs.* Phillips, 94 Pa. 15;
 Hill *vs.* Pardee, 143 Pa. 98;
 Noonan *vs.* Pardee, 200 Pa. 474;
 Madden *vs.* Lehigh Valley Coal Co., 212 Pa. 63;
 Miles *vs.* Pennsylvania Coal Co., 214 Pa. 544;
 Miles *vs.* Pennsylvania Coal Co., 217 Pa. 449;
 Tischler *vs.* Pennsylvania Coal Co., 218 Pa. 82;
 Graff *vs.* Scranton Coal Co., 244 Pa. 592;
 Weller *vs.* Davis, 245 Pa. 280;
 Kirwin *vs.* D., L. & W. R. R. Co., 249 Pa. 98;
 Miles *vs.* N. Y., Sus. & W. Coal Co., 250 Pa. 147;
 Gordon *vs.* D., L. & W. R. R. Co., 253 Pa. 110;
 Scranton *vs.* Scranton Coal Co., 256 Pa. 322;
 Commonwealth *vs.* Clearview Coal Co., 256 Pa. 328;
 Scranton *vs.* Peoples Coal Co., 256 Pa. 332;
 Atherton *vs.* Clearview Coal Co., 267 Pa. 425;
 Breisch *vs.* Locust Mt. Coal Co., 267 Pa. 546;
 Charnetski *vs.* Miners Mills Coal Co., 270 Pa. 459;
 Jordan *vs.* Clearview Coal Co., 270 Pa. 216;
 Young *vs.* Thompson, 272 Pa. 360;
 Home Brewing Co. *vs.* Thomas Collieries Co., 274
 Pa. 56.

Total—Bituminous Mining, 37.
 Anthracite Mining, 25.

The Kohler Act

THE KOHLER ACT.

(Act of May 27, 1921, P. L. 1198)

No. 445.

AN ACT.

Regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties.

SECTION 1. Be it enacted, &c., That it shall be unlawful Mining of anthracite coal. for any owner, operator, director, or general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, so to mine anthracite coal or so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of—

(a) Any public building or any structure customarily Must not cause subsidence of certain lands and structures. used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

(d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed.

(e) Any cemetery or public burial ground.

SECTION 2. Every owner, operator, lessor, lessee, or Maps and plans of proposed operations. general contractor, engaged in the mining anthracite coal within this Commonwealth, shall make, or cause to be made, a true and accurate map or plan of the workings or excavations of such coal mine or colliery, which shall be drawn to a scale of such size as to show conveniently

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and legibly all markings and numbers required to be placed thereon by the terms of this Act. Such maps or plans shall also show, in detail and in markings of a distinctive color, all contemplated workings which are intended to be undertaken or developed within the succeeding six months. Such maps or plans shall be deposited, as often as once in six months, with the mayor in cities where such coal mines or collieries are situated. In boroughs and townships of the first class, such maps or plans shall be filed with the county commissioners of the proper county. Such maps or plans shall be considered public records, and shall be open to the inspection of the public, and copies or tracings may be made therefrom. No mining shall be done which is not shown on the map or plan filed at least ten days previously.

SECTION 3. Every owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent, or other person in charge of, or having supervision over, any anthracite coal mine or mining operation in this Commonwealth, shall be, and is hereby required: (a) To designate, within a period of six months from the passage of this Act, and to keep designated by number, each and every pillar of anthracite coal beneath the surface still remaining in place at the time this Act goes into effect and all pillars thereafter created, the number of each pillar to be placed in a conspicuous position with white paint or some other equally durable and visible substance; and (b) to designate, or cause to be designated, by numerals of convenient and legible size, upon all maps or plans mentioned in Section Two of this Act, with the space on each map or plan designating any pillar of coal, the number of such pillar.

SECTION 4. The mayor of cities, the burgess of boroughs, the boards of township commissioners of townships

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of the first class, and such engineers and other agents as they may employ, shall, at all reasonable times, be given access to any portion of any anthracite coal mines or mining operations which it may be necessary or proper to inspect, for the purpose of determining whether the provisions of this Act are being complied with, and all reasonable facilities shall be extended by the owner or operator of such mine or mining operation for ingress, egress, and inspection.

SECTION 5. The mayor of cities, the burgess in boroughs, the board of township commissioners in townships of the first class, shall have the power to prevent the mining of anthracite coal beneath the surface in any mine or mining operation in which the pillars of coal shall not have been numbered and the numbers thereof designated by maps or tracings as provided by this Act; and where mining operations are being conducted in violation of this Act, they shall have the power to prevent any miner or laborer, other than those necessary for the protection of life and property, from entering the mine or mining operation, until such time as the provisions of this Act have been complied with.

Mining where pillars have not been designated.

Mining in violation of act.

SECTION 6. The provisions of this Act shall not apply to townships of the second class, nor to any area wherein the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person.

To what cases act is in-applicable.

SECTION 7. Any owner, operator, lessor, lessee, or general contractor, engaged in the mining of anthracite coal, or any president, director, general manager, superintendent or other person in charge of, or having supervision over, any anthracite coal mine or mining operation, who shall violate any provision of this Act, shall be deemed

Violations.

Misdemeanor.

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guilty of a misdemeanor, and, upon conviction, shall be sentenced to pay a fine of not more than five thousand dollars, or undergo imprisonment for not more than one year, both or either, at the discretion of the Court.

SECTION 8. The Courts of Common Pleas shall have power to award injunction to restrain violations of this Act.

SECTION 9. This Act is intended as remedial legislation, designed to cure existing evils and abuses, and each and every provision thereof is intended to receive a liberal construction such as will best effectuate that purpose, and no provision is intended to receive a strict or limited construction.

SECTION 10. It is hereby declared that the provisions of this Act are severable one from another, and if, for any reason, this Act shall be judicially declared and determined to be unconstitutional so far as relates to one or more words, phrases, clauses, sentences, paragraphs, or section thereof, such judicial determination shall not affect any other provision of this Act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the validity in any respect of one or more of the provisions of this Act.

SECTION 11. This Act shall go into effect three calendar months after its final approval.

SECTION 12. All acts and parts of acts inconsistent with this Act are hereby repealed.

Approved—The 27th day of May, A. D. 1921.

WM. C. SPROUL.

The foregoing is a true and correct copy of the Act of the General Assembly No. 445.

(Signed) CYRUS E. WOODS,
Secretary of the Commonwealth.

The Fowler Act.

THE FOWLER ACT.

(Act of May 27, 1921, P. L. 1192)

No. 444.

AN ACT.

Affecting anthracite coal mines and operations; establishing the Pennsylvania State Anthracite Mine Cave Commission; defining its jurisdiction and powers; imposing duties upon owners and operators of anthracite coal mines; and imposing penalties.

SECTION 1. Be it enacted, &c., That the words "owner," "operator," and "mine," and the phrase "anthracite coal mine," wherever used in this Act, are declared to bear the same meaning as the same bear in the Act, approved the second day of June, one thousand eight hundred and ninety-one (Pamphlet Laws, one hundred seventy-six to two hundred and eight, inclusive).

Pennsylvania
State Anthracite
Mine Cave
Commission.

Definitions.

SECTION 2. Within three months after the approval of this Act, there shall be established a commission, to be known as the Pennsylvania State Anthracite Mine Cave Commission.

Establishment
of Commission.

SECTION 3. It shall be the duty of the owner or operator of every anthracite coal mine, within six months after the approval of this Act, to signify in writing to the commission whether or not such owner or operator voluntarily accepts the provisions of section eight of this Act. Such acceptance or rejection shall be acknowledged, and recorded in the recorder of deeds' office of the county or counties in which such anthracite coal mine or mines are situate, in the same manner as deeds of conveyance. An owner or operator who has rejected the provisions of section eight of this Act may thereafter accept the same in the manner hereinbefore provided.

Acceptance or
rejection of
act by
operators.

SECTION 4. Every owner or operator who fails to signify in writing a non-acceptance of the provisions of sec-

Acceptance
presumed.

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tion eight of this Act, within six months from the approval of this Act, shall be conclusively presumed to have accepted the provisions of said section. Every acceptance or failure to signify a non-acceptance as aforesaid shall bind the successors in title, heirs, personal representatives, and assigns of such owner or operator.

SECTION 5. Every corporation hereafter to be organized, under the laws of this Commonwealth, under a charter giving the privilege to own or operate anthracite coal mines, shall be conclusively presumed to consent to be bound by the provisions of section eight of this Act.

SECTION 6. Every foreign corporation hereafter admitted to do business within the jurisdiction of this Commonwealth under a charter giving the privilege to own or operate anthracite coal mines shall be conclusively presumed to consent to be bound by the provisions of section eight of this Act.

SECTION 7. It shall be the duty of every owner and operator of every anthracite coal mine or mining operation to file with the aforesaid commission copies of all maps and plans of their underground workings, whenever the same are required by existing law to be filed or deposited with any public officer or authority.

SECTION 8. It shall be the duty of every owner or operator who accepts or becomes subject to the provisions of this section of this Act in the manner hereinbefore provided, to pay the commission herein established, on the first day of May, August, November, and February, respectively, a sum equal to two per centum of the market price, when prepared for market, of all anthracite coal mined within this Commonwealth by such owner or operator during the first, second, third, and fourth quarters, respectively, of every year. The commission shall have power by suit in assumpsit to enforce collection of such

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sums as become delinquent, with interest thereon at the rate of one per centum per month.

SECTION 9. All sums received by the commission shall be deposited to the credit of the commission in one or more banks which are entitled to receive deposits of State moneys, and shall be expended only, upon order of the commission, for the purposes and objects and in accordance with the provisions of this Act.

Deposit and expenditure commission funds.

SECTION 10. Said funds so received shall be expended by the commission for the salaries and other expenses of said commission, for the prevention and elimination of danger to life, limb, and health, and avoidance of grave public harm by surface subsidence resulting from past or future anthracite coal mining operations, and likewise for the prevention, ascertainment, and remedying of damages to persons and properties so resulting.

Purposes for which funds may be expended.

SECTION 11. Every person, natural or artificial, including municipalities, claiming to have suffered injury or damage to person or property by reason of surface subsidence occurring within six years prior to the passage of this Act, or which may hereafter occur, resulting from past or future anthracite coal mining operations, may file a sworn itemized statement thereof with the commission, which shall promptly proceed to investigate the claim, and shall award the claimant such sums as, in its judgment, will fairly compensate for the damages sustained.

Claims for damages resulting from caves.

Investigation and award.

SECTION 12. The commission shall have power in every case, instead of awarding damages to such claimants, to cause injured property to be restored to its former condition, and for this purpose to employ labor, purchase materials, or let contracts.

Restoration lieu of damages.

Release.

SECTION 13. No awards shall be paid to any such claimant, except upon condition that such claimant execute a

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general release of all past damages to the particular property injured or damaged in favor of the owner or operator whose workings occasion the damage, provided said owner or operator has accepted the provisions of section eight of this Act.

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SECTION 14. Every owner or operator who has accepted the provisions of section eight of this Act shall be privileged, at any time, to submit to the commission an application, setting forth details of proposed mining operations to recover coal belonging to the applicant and located beneath a structure, highway, or other improvement of a class protected against subsidence by the provisions of the act of one thousand nine hundred and twenty-one, entitled "An act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties." The application shall also set forth, under oath, the belief of the applicant that the removal of such coal can be affected without endangering human life, limb, or health, or causing grave public harm.

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SECTION 15. The commission shall take prompt action upon such application, make such investigation as appears to be required, and, if convinced of the truth of the matters set forth in the application, make an order permitting the applicant to carry out proposed mining operations, under such safeguards of life, limb, health, and general welfare, as it may reasonably require; and all damages occasioned by such mining operations shall be paid by the commission: Provided, however, That nothing in this Act contained shall be construed to affect any express or implied contractual or property right of support belonging to the owner of the overlying or adjacent surface.

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tors.
SECTION 16. No owner or operator shall be prosecuted for causing a subsidence, collapse, or cave-in of any structure, highway, or other property, where the mining opera-

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tions had been conducted in pursuance of an order of the commission and in a careful and skillful manner.

SECTION 17. The commission, its engineers, and agents, shall have the right of access, at all reasonable times, to all anthracite coal mines and mining operations, and to all papers, records, books, maps, plans, charts, and other documents pertaining thereto; and where, upon investigation, conditions appear to exist in any mine or mining operation which threatens the life, limb, or health of persons upon the surface, the commission may, after hearing and determination of the existence of such danger, order and direct the owner or operator in control of such mine or mining operation to leave or provide such support or to take such precautions as the commission may determine are reasonably necessary to avoid or eliminate such danger, provided that any owner or operator who has accepted the provisions of section eight of this Act, and contributed the sums required to be paid under said section, shall be reimbursed by the commission for the fair and reasonable value or cost of the support so required to be left or provided.

Right of access to operations and books.

Orders to remedy dangerous conditions.

Reimbursement of operator.

SECTION 18. Whenever, in the opinion of the commission, it shall be deemed necessary for the safety of the traveling public using any public street or of any person occupying or residing upon property from under which the coal has been mined prior to the passage of this Act or is about to be mined out under the provisions of this Act, in such a manner and to such an extent as to create a public peril, the commission shall have the right and power to withdraw said portion or portions of such street or streets from public use by closing the same until such time as the danger is removed, and likewise, upon the petition of the majority of the inhabitants of any territory affected as aforesaid, to direct said inhabitants to temporarily remove therefrom until such time as the danger has been eliminated. In such case, the commission shall provide suitable and

Closing of dangerous streets.

Removal from endangered properties.

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adequate housing facilities for the inhabitants so affected, and recompense any injured party for all damages and expenses by them sustained in such connection, such damages to include all expense of moving from and to said property and all additional expense, including loss of rents, resulting from the aforesaid removal, which the commission may approve, and likewise any damage to any buildings or building so affected, except to the extent which the same may be repaired or restored by said commission or under its authority out of the funds so provided. In case any owner or occupant of any property in such affected territory shall refuse to comply with any order of the commission in this behalf, he shall not be entitled to receive any compensation or reparation from said commission.

SECTION 19. In case at any time the commission has not sufficient funds to pay all sums awarded by it, the following preference shall be made in the payments:

1. Payments of the necessary expenses of the commission.
2. Awards to persons injured or damaged in person or property by mining operations of mines the owners or operators of which have accepted the provisions of section eight of this Act, priority being given in accordance with the date upon which the claims were filed.
3. Expenditures for the prevention of threatened injury or damage to persons or property by surface subsidence resulting from anthracite coal mining operations. Where the commission shall certify that an emergency exists, such payments shall take precedence over payments of awards of damage for injuries.
4. All other awards, priority being given in accordance with the date upon which the claims were filed.

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Where payments of awards are deferred for lack of funds, such awards shall bear interest at the rate of six per centum per annum.

SECTION 20. The commission shall consist of a chairman and two other members, one of whom shall be a practical mining engineer, and all of whom shall be citizens and residents of the anthracite producing counties of the commonwealth, to be appointed by the Governor and to hold office during his pleasure, and shall establish headquarters at such place in the anthracite region as it may determine.

Personnel of
commission.

Headquarters

SECTION 21. The members of the commission shall each receive a salary of eight thousand dollars per annum and their actual necessary expenses. The commission shall employ a secretary, counsel, and such other deputies, assistants, engineers, investigators, and clerks, as it seems necessary, and may fix and pay the salaries thereof, the organization to be modeled as nearly as practicable upon the organization of the Public Service Commission: Provided, however, That all salaries and expenses of the commission shall be payable only out of the funds received by them from owners and operators who have accepted the provisions of section eight of this Act, and no funds shall be payable out of the public treasury on account of salaries or expenses of the commission or awards of damages.

Organization
and salaries.

Payment of
salaries.

SECTION 22. The commission shall make annual report to the Governor, and shall recommend to the Governor such changes in the laws as will, in its opinion, reduce the evils resulting from mine caves or surface subsidences in the anthracite region of this Commonwealth.

Report.

SECTION 23. The commission shall have power to issue subpoenas and subpoena duces tecum, to administer oaths, and to regulate the procedure to govern the conduct of its affairs. Any person aggrieved by any final order of the commission shall have the right to appeal to the courts of

Subpoenas and
oaths.

Appeals.

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the Commonwealth to the same extent and in the same manner as appeals are allowed from final orders of the Public Service Commission.

struction. SECTION 24. It is hereby declared that the provisions of this Act are severable one from another, and if, for any reason, this Act should be judicially declared and determined to be unconstitutional so far as relates to one or more phrases, clauses, sentences, paragraphs, or sections thereof, such judicial determination shall not affect any other provisions of this Act. It is hereby declared that the remaining provisions would have been enacted notwithstanding such judicial determination of the invalidity in any respect of one or more of the provisions of this Act.

tions. SECTION 25. Any owner or operator, or officer, agent, or employe thereof, wilfully violating any order of the commission shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more than five thousand (\$5,000) dollars, or undergo imprisonment of not more than one (1) year, or both, at the discretion of the court.

al. SECTION 26. All acts or parts of acts inconsistent with this Act are hereby repealed; Provided, however, That nothing herein contained, except as expressly recited, shall in any manner affect the act of one thousand nine hundred and twenty-one, entitled "An act regulating the mining of anthracite coal; prescribing duties of certain municipal officers; and imposing penalties."

Approved—The 27th day of May, A. D. 1921.

WM. C. SPROUL

The foregoing is a true and correct copy of the Act of the General Assembly No. 444.

(Signed) CYRUS E. WOODS,
Secretary of the Commonwealth.

No. 549

October Term, 1922.

In the

Supreme Court of the United States

Pennsylvania Coal Company

Plaintiff-in-Error,

H. J. Mahon and Margaret Craig Mahon

Defendants-in-Error.

In Error to the Supreme Court of Pennsylvania

**Exhibits in connection with Brief of
the City of Scranton, Intervenor**

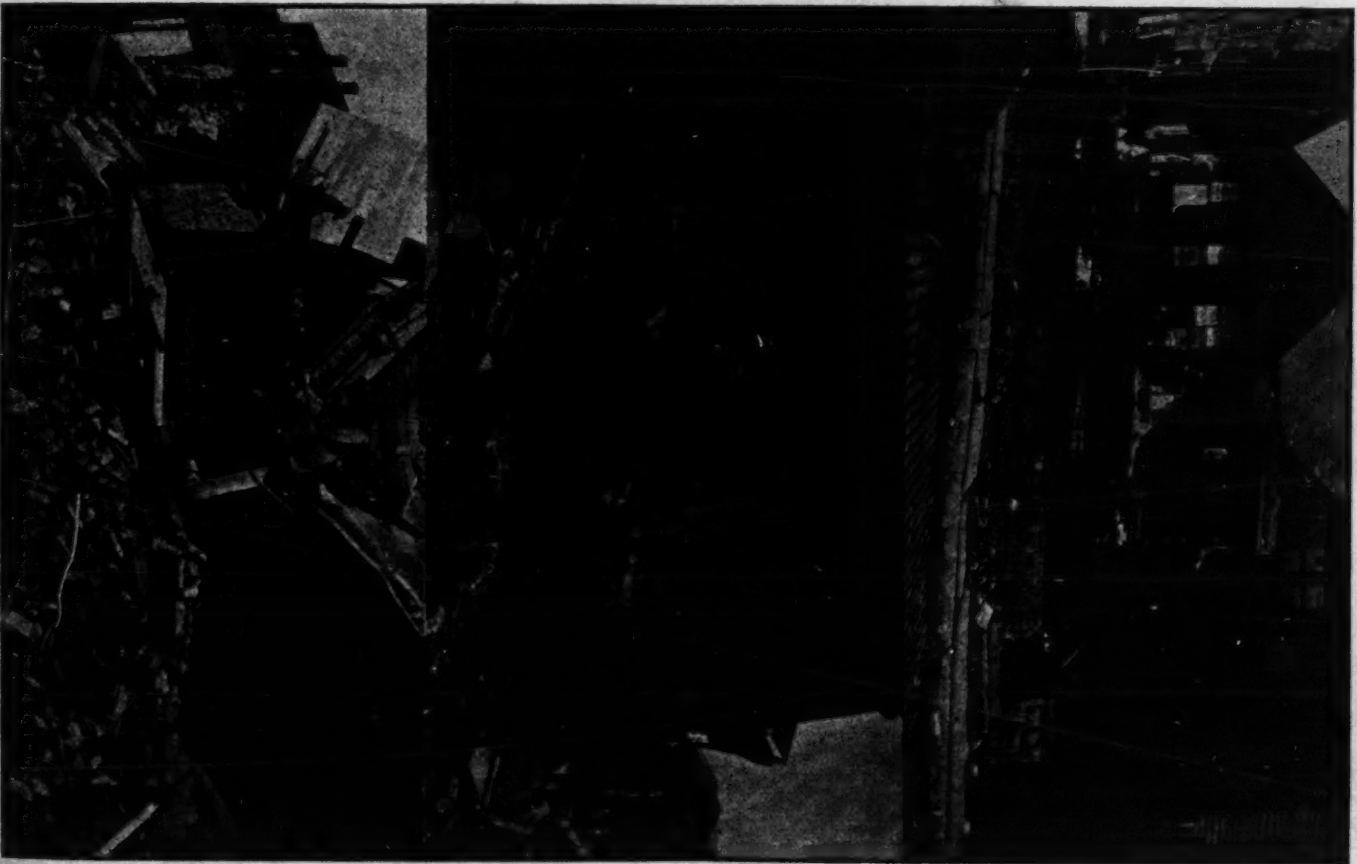
**This envelope contains exact copies of the photographic
representations of conditions in the mine cave areas
which were in the hands of every representative
and senator of the Pennsylvania Legislature
during the hearings on the Kohler Bill.**

PHILIP V. MATTES,

City Solicitor,

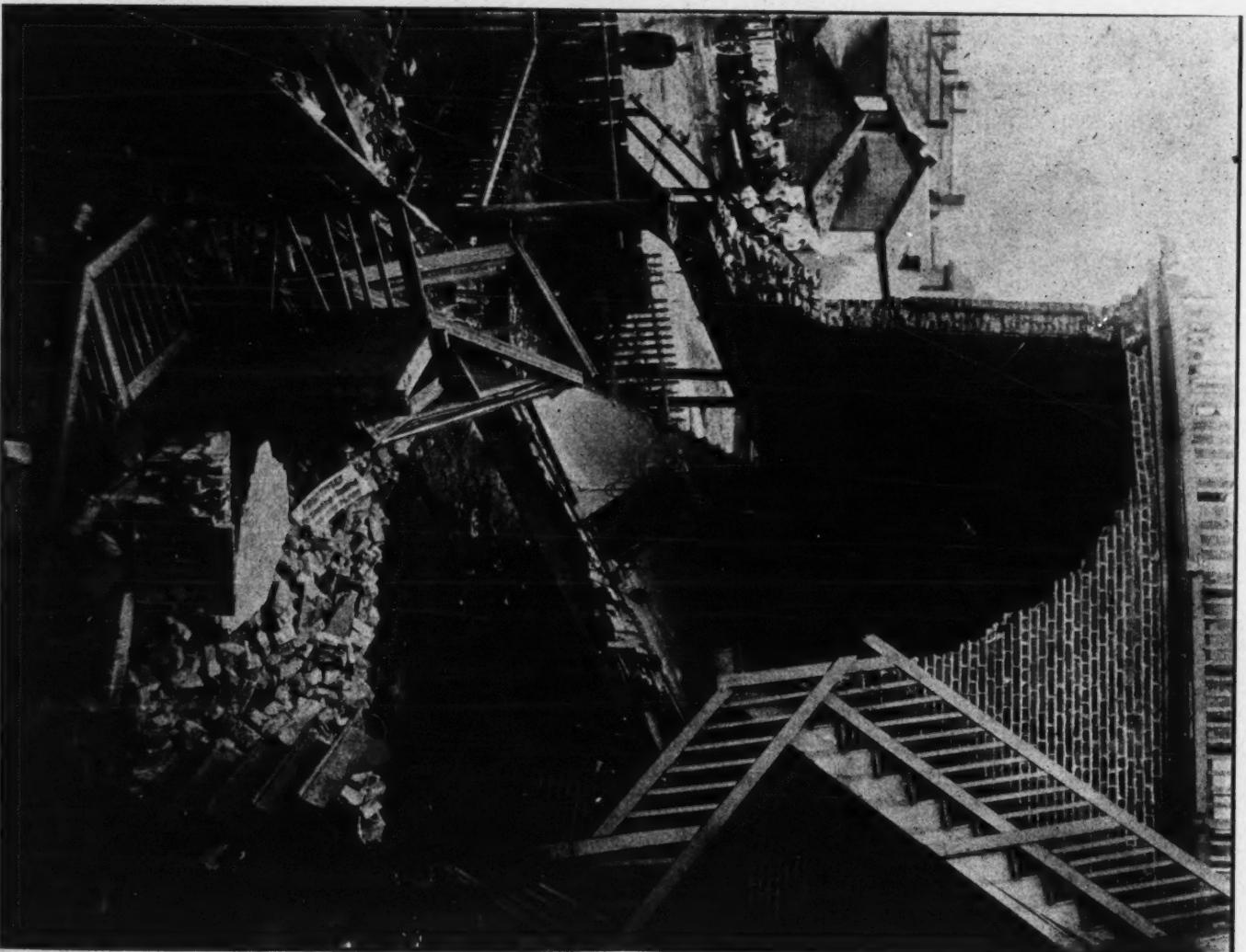
For the City of Scranton.

THREE GENERAL VIEWS OF MINE CAVE HAVOC, SCRANTON, PA.



The above pictures are typical of mine cave havoc in Scranton, Pa., where the people are insisting upon remedial legislation in order to protect their lives and their property.

AN OPPORTUNE HOUR OF DISASTER SAVED HUNDREDS



The World Theatre, Scranton, Pa., wrecked by a mine cave shortly after the audience had been dismissed for the night. Had this occurred shortly before the time of the collapse of the building, hundreds of lives would have been sacrificed to the greed of mining operators, now seeking to avoid responsibility.

NO. 16 PUBLIC SCHOOL, SCRANTON, PA.



Wrecked by a mine cave on August 29, as school was to open a week later. Had this occurred a few days later, when 500 pupils were assembled for classes, a panic would have resulted. The total damage of this cave is estimated at \$50,000.

THE PROSSER FAMILY HOME, NORTH SUMNER AVENUE, SCRANTON, PA.



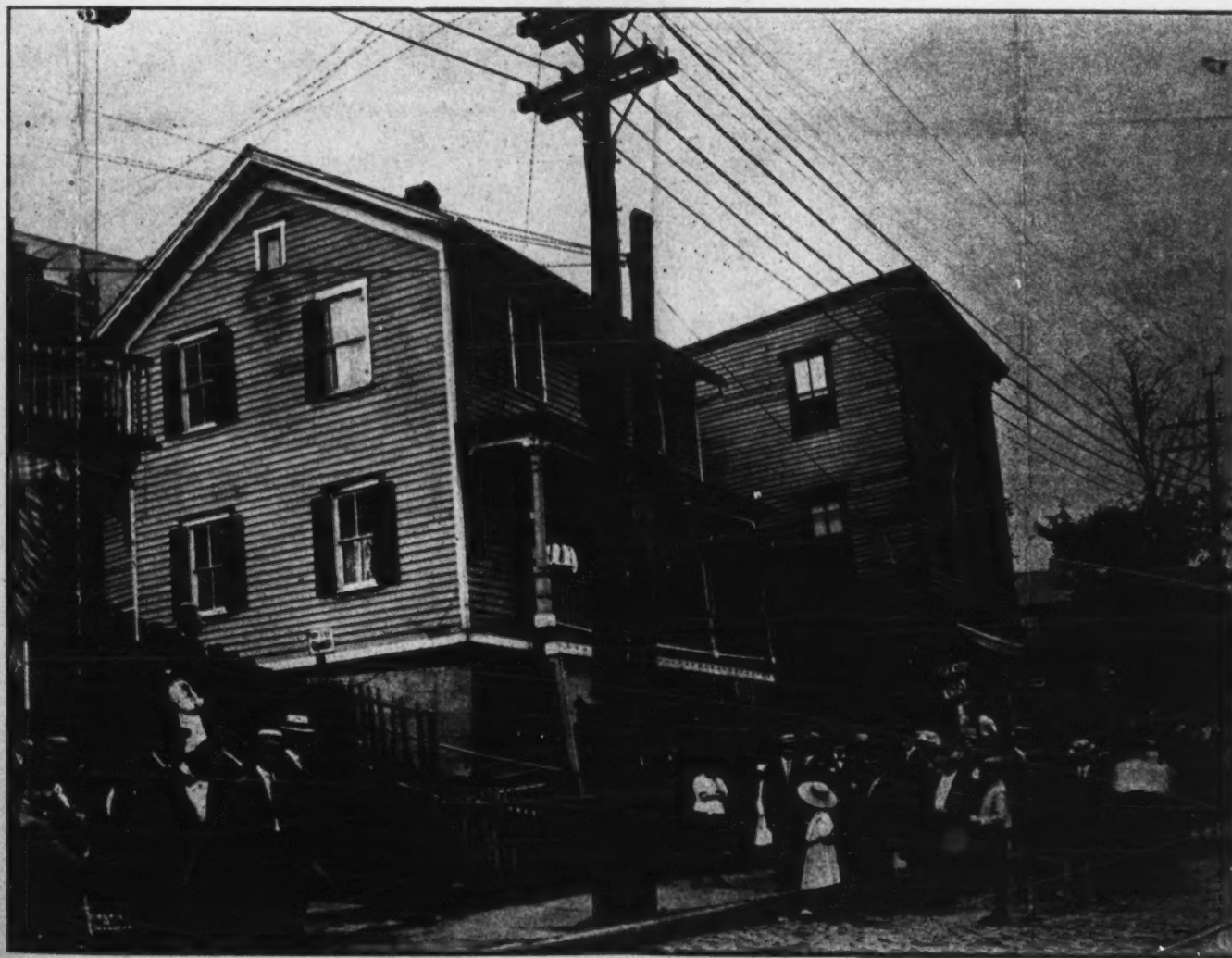
Extensive timbering being done to save the home of Mr. Prosser at Scranton after a mine cave had dropped the surface beneath the property. This is within a hundred feet of where Robert Warburton, aged 12 years, lost his life when the surface dropped and he was engulfed in a deep mine cave pit.

HOME ON RIPPLE STREET, SCRANTON, PA., WRECKED BY MINE CAVE



Another family driven into the street as a result of a mine cave such as menaces the life of the people in the anthracite region.

SCRANTON FAMILIES DRIVEN INTO THE STREET BY MINE CAVE



Scene along Robinson Street, West Scranton, where many homes have been wrecked by ruthless mining operations.

THE LAVELL FAMILY HOME FOLLOWING A MINE CAVE



This Scranton, Pa., family were driven into the street because of a mine cave that wrecked their home.

FRONT OF FOUR-FAMILY BUILDING COLLAPSES AS RESULT OF CAVE



A concrete block apartment in Scranton, Pa., collapses as a result of a mine cave at 1 o'clock in the morning, driving all occupants into the street.

WHAT A FIRE TRUCK, RESPONDING TO AN ALARM, JUST MISSED



While responding to a fire alarm, William Frey, of Taylor, Pa., near Scranton, Pa., a truck driver, just missed dropping the fire fighting apparatus into this 30-foot pit on a main thoroughfare. Quick action on the part of the driver saved the lives of these firefighters.

ONE OF SOUTH SCRANTON'S INDUSTRIAL PLANTS WRECKED



A mine cave almost completely wrecked this big industrial plant in South Scranton. The property damage was great and many were thrown out of employment.

LADDER FROM THIRD STORY WINDOW SAVED THESE LIVES



ROSS AVE. CAME IN

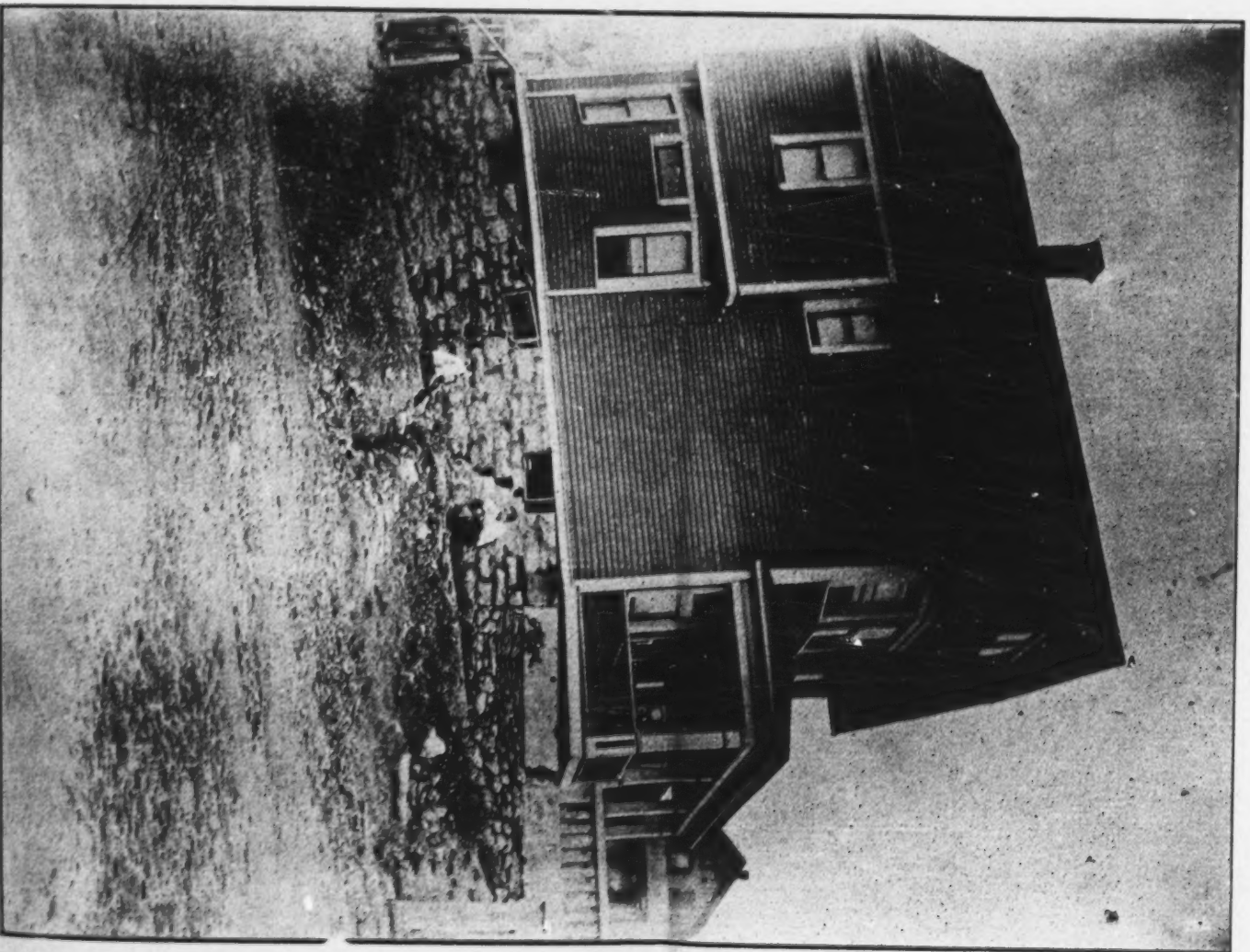
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Home
↑

Surface
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When the home of Mr. and Mrs. Buckley, Ross Avenue, was
burned to the ground, a ladder from the third story window saved these lives.

THE FORERUNNER OF RUIN



The home of Michael Crane, Ripple Street, Scranton, Pa., just as the surface began to settle.

EX-CONGRESSMAN JOHN R. FARR'S PROPERTY DEMOLISHED



West Lackawanna Avenue, Scranton, Pa., property completely demolished by a mine cave.
This building has since collapsed into a pile of wreckage.

HOUSER PROPERTY WRECKED BY GAS EXPLOSION FOLLOWING MINE CAVE



This property nearly adjoins the Park Theater, Scranton, Pa. It was demolished by an explosion of gas following a mine cave and the result thereof, a few minutes after the theater audience had been dismissed.

GRAVES OF THE DEAD ROCKED BY MINE CAVES



The last resting place of a well known Scranton, Pa., woman, whose grave was torn open, a few weeks after burial, by a mine cave, in Cathedral Cemetery, where hundreds of bodies have been dropped into the mine beneath. The casket is shown in the pit, torn asunder, and the hand of the corpse is seen protruding from the burial case.

Syllabus.

PENNSYLVANIA COAL COMPANY v. MAHON
ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

No. 549. Argued November 14, 1922.—Decided December 11, 1922.

1. One consideration in deciding whether limitations on private property, to be implied in favor of the police power, are exceeded, is the degree in which the values incident to the property are diminished by the regulation in question; and this is to be determined from the facts of the particular case. P. 413.
2. The general rule, at least, is that if regulation goes too far it will be recognized as a taking for which compensation must be paid. P. 415.
3. The rights of the public in a street, purchased or laid out by eminent domain, are those that it has paid for. P. 415.
4. Where the owner of land containing coal deposits had deeded the surface with express reservation of the right to remove all the coal beneath, the grantees assuming the risk and waiving all claim to damages that might arise from such mining, and the property rights thus reserved, and contracts made, were valid under the state law, and a statute, enacted later, forbade mining in such way as to cause subsidence of any human habitation, or public street or building, etc., and thereby made commercially impracticable the removal of very valuable coal deposits still standing unmined, *held*, that the prohibition exceeded the police power, whether viewed as a protection to private surface owners or to cities having only surface rights, and contravened the rights of the coal-owner under the Contract Clause of the Constitution and the Due Process Clause of the Fourteenth Amendment.¹ P. 413.

274 Pa. St. 489, reversed.

¹ The following summary of the statute involved is taken from the opinion of the Pennsylvania Supreme Court:

The statute is entitled: "An act regulating the mining of anthracite coal; prescribing duties for certain municipal officers; and imposing penalties."

Section 1 provides that it shall be unlawful "so to conduct the operation of mining anthracite coal as to cause the caving-in, collapse, or subsidence of (a) Any public building or any structure cus-

ERROR to a decree of the Supreme Court of Pennsylvania, for the defendants in error, in their suit to enjoin the Coal Company from mining under their property in such way as to remove supports and cause subsidence of the surface and of their house.

Mr. John W. Davis with whom *Mr. Frank W. Wheaton*, *Mr. Henry S. Drinker, Jr.*, and *Mr. Reese H. Harris* were on the brief, for plaintiff in error.

I. The statute impairs the obligation of the contract between the parties.

On August 26, 1921, the Mahons were bound by a valid covenant to permit the Coal Company, which had sold to them or to their ancestor the surface rights only in their lot, to exercise without objection or hindrance

tomarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations; (b) Any street, road, bridge, or other public passageway, dedicated to public use or habitually used by the public; (c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law; (d) Any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed; (e) Any cemetery or public burial ground."

Sections 2 to 5, inclusive, place certain duties on public officials and persons in charge of mining operations, to facilitate the accomplishment of the purpose of the act.

Section 6 provides the act "shall not apply to [mines in] townships of the second class [i. e., townships having a population of less than 300 persons to a square mile], nor to any area wherein the surface overlying the mine or mining operation is wild or unseated land, nor where such surface is owned by the owner or operator of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person."

Section 7 sets forth penalties; and § 8 reads: "The courts of common pleas shall have power to award injunctions to restrain violations of this act." P. L. 1921, p. 1198.

by them, its reserved right to mine out all the coal, without liability to them for damages occasioned thereby, which damages had been expressly waived as a condition for the grant. On August 27, 1921, the statute completely annulled this covenant, by giving them the right, by injunction, to prevent such mining. The fact that this contract was contained in a deed of conveyance does not make it any the less a contract within the constitutional protection. A deed is a contract between the parties thereto, even though the grantor is a sovereign State. *Fletcher v. Peck*, 6 Cr. 87, 137; *Ohio Trust Co. v. Debolt*, 16 How. 416, 432.

II. The statute takes the property of the Coal Company without due process of law.

Whenever the use of the land is restricted in any way or some incorporeal hereditament is taken away which was appurtenant thereto, it constitutes as much a taking as if the land itself had been appropriated. *Tiedeman*, State and Federal Control of Real and Personal Property, p. 702, § 143; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 238.

If an act would be unconstitutional which specifically required one-third of the coal to be left in place to support the surface, it is in no way saved by the subterfuge of permitting the mining, provided this does not cause the subsidence which will inevitably result unless the Coal Company provides artificial support at a cost exceeding the value of the coal. The theoretical right to remove the coal without disturbing the surface is, as a practical matter, no more available than was Shylock's right to his pound of flesh.

As pointed out in Justice Kephart's dissenting opinion, the courts of Pennsylvania have recognized three distinct estates in mining property: (1) The right to use the surface; (2) the ownership of the subjacent minerals; (3) the right to have the surface supported by the subjacent strata.

This third right, called the Third Estate, has been recognized as so distinct from the ownership of the surface or of the minerals that it may be transferred to and held or conveyed by one who was neither the owner of the surface nor of the coal. *Penman v. Jones*, 256 Pa. St. 416; *Charnetaki v. Coal Co.*, 270 Pa. St. 459; *Young v. Thompson*, 272 Pa. St. 360.

III. The statute is not a *bona fide* exercise of the police power.

With the swing of the popular pendulum during recent years, the descendants of the able lawyers who, forty years ago, were employed to draft special legislation, are now employed in drafting laws to evade the restrictions of the state and federal constitutions. This legislation divides itself generally into two classes. In the first class fall those laws which are prompted by upright and public spirited progressives who, impelled by the need for the immediate adoption of the reforms which they advocate, are impatient at the constitutional restrictions on federal and state power, and are unwilling to await the enlargement of such powers by constitutional amendment. Examples of this class of law are the two recent Child Labor Acts.

The second class consists of laws passed at the insistence of a determined and organized minority, designed to confiscate for their benefit the rights of producers of property, and passed by a legislature in time of political stress, in its anxiety to secure the votes controlled by the advocates of the measure. Such a law, we submit, is the Kohler Act. To protect a complaisant public from such laws is one of the primary functions of the courts.

When it is asserted that a statute is not what the legislature sought to have it appear, it is necessary for those attacking its constitutionality to point, in the statute itself, to evidences which, viewed in the light of the court's knowledge of human nature and of legislative practice, are sufficient to demonstrate the position taken.

So tested, the Kohler Act is in reality what this Court in *Loan Association v. Topeka*, 20 Wall. 655, characterized as "not legislation," but "robbery under the forms of law."

It will be observed that the favored expedient of the draughtsmen of legislation of either of the classes to which we have alluded, is to dress up their statute in the garb of a statute properly coming within one of the recognized powers of the legislative body enacting it.

The Kohler Act speaks as a regulation of the mining of anthracite coal, to protect the lives and safety of the public. It begins with a vivid preamble, from which it would appear that a considerable part of the population of Pennsylvania is in immediate danger of the loss of life and limb by being incontinently projected into unexpected abysses formed by the sudden subsidence of the surface by reason of the mining of anthracite coal. In his dissenting opinion, however, Mr. Justice Kephart states that the actual damage to date is confined to a small portion of the City of Scranton. Anthracite mining, however, is conducted in nine counties under a surface area comprising 496 square miles. While this preamble may possibly be regarded as spontaneous expression by the legislature of the reasons for the passage of the act, we call attention to the fact that an honest and valid law needs no specious preamble to bolster up its constitutionality. Is it not an equally plausible explanation of the preamble that the framers of this act knew full well that it was not really a police regulation and were seeking to coerce the courts into holding it to be such merely by affixing to it a label?

The act also contains a clause emphasizing that it is remedial legislation and craving a broad construction, which, if the act is what it says it is, will not help it, but which, if it is really a confiscatory measure masquerading as a police regulation, merely serves to emphasize this

feature. The preamble and § 9 are the hand of Esau. Section 1 is the voice of Jacob. *Dobbins v. Los Angeles*, 195 U. S. 223; *Lawton v. Steele*, 152 U. S. 133.

Does the interest of the public generally, as distinguished from the private interest of Mr. and Mrs. Mahon, require that they shall be under no necessity of removing temporarily from their dwelling while the mining under their lot is going on, or of themselves making the necessary expenditures to repair their house and to fill up the cracks in their sidewalk and lawn after the subsidence is completed, using that part of the purchase money which they saved by buying the lot without the right of support?

Are the drastic prohibitions of § 1 reasonably necessary to protect the lives and safety of persons on the Mahon lot or are they unduly oppressive on the Coal Company?

The act shows on its face that its purpose is not to protect the lives or safety of the public generally but merely to augment the property rights of a favored few.

Genuine public streets or public property where the right of support is vested in the public, as well as private property, where such support has not been sold, have been amply protected. Under the Mine Law of 1891 (3 *Purd.* 2555), the Davis Act (Act of July 26, 1913, P. L. 1439; 6 *Purd.* 6626) maps of underground workings, both past and prospective, must be filed with State Inspectors and City and Borough Mine Bureaus. Any citizen can at any time determine whether his underlying support is jeopardized. Actual inspection is always available and injunctions easily obtainable. See *Scranton v. Peoples Coal Co.*, 256 Pa. St. 332; 274 Pa. St. 63. All this was true before the Kohler Act.

The only interests not heretofore fully protected both by the right to damages and to injunctive relief, were those individuals who were owners of surface rights merely, and whose right of subjacent support had been

withheld or waived, presumably for adequate consideration, or public or quasi-public bodies who, instead of condemning their streets or school buildings and thus paying for and securing the permanent support of the underlying coal, have obtained them at a bargain from parties who acquired only restricted title such as the Mahons possess. The right of such surface owners, the courts of Pennsylvania have properly held, can rise no higher than that of their grantor, no matter whether the present holder be a public service corporation operating water pipes, *Spring Brook Water Co. v. Pennsylvania Coal Co.*, 54 Pa. Super. Ct. 380; a school district which has erected its building on a lot acquired without the right of support, *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328; or a city which has similarly acquired its streets by dedication from one who himself had no right of support, *Scranton v. Phillips*, 57 Pa. Super. Ct. 633.

Apart from the consideration that the lives and safety of such classes of persons and those whom they permit to come on their property need no protection other than a proper notice to remove temporarily until it becomes safe to return, it is obvious that the Kohler Act is not directed to the safety of the public, but is for the benefit solely of a particular class.

That there may be other private persons in a situation similar to that of these plaintiffs merely makes the act for the benefit of a particular class of individuals, and not for the benefit of the public generally.

A further feature of the Kohler Act which demonstrates that it was not enacted for the protection of the general public is that by its terms it does not apply to all those similarly endangered. The life or safety of a surface owner is obviously subjected to equal jeopardy irrespective of whether the hole into which he falls was formed by the mining of bituminous or anthracite coal, or, for that mat-

ter, of iron ore, quartz or gravel. The Kohler Act, however, applies only to subsidences caused by the mining of anthracite coal.

A further evidence that the act is disingenuous is found in § 5. If it were really to protect life and safety, the municipal authorities would naturally be empowered, in case of threatened subsidence, to rope off the endangered area and to compel the occupants to vacate the premises. Instead, they are merely empowered to shut up the mine and to exclude the workmen therefrom.

Further legislative evidence of the true purpose is found in the provisions of another statute, passed on the same day and conceded to be its twin measure. This is the so-called Fowler Act, discussed in the dissenting opinion. There could be no clearer demonstration than that afforded by the intrinsic evidence of these two interrelated acts, that the sole design of the framers of both was to coerce the coal companies either into donating to the surface owner sufficient coal in place to support the surface, or paying him the damages which, as a means of getting a cheap lot, he had expressly bargained away.

The means adopted by the Kohler Act are not reasonably necessary for the accomplishment of its ostensible purpose, and are unduly oppressive upon individuals.

IV. If surface support in the anthracite district is necessary for public use, it can constitutionally be acquired only by condemnation with just compensation to the parties affected. *Commonwealth v. Clearview Coal Co.* 256 Pa. St. 328; *Raub v. Lackawanna County*, 60 Pa. Super. Ct. 462; *Chicago, Milwaukee & St. Paul Ry. Co. v. Wisconsin*, 238 U. S. 491.

The Barrier Pillar Law, involved in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, in no sense operates to transfer, without compensation, a permanent property right or easement from one party to another. The compensation to each owner for the burden of maintaining

the pillar on his side is found in the reciprocal benefit from the pillar maintained by his neighbor. See *Bowman v. Ross*, 167 U. S. 548. Furthermore, it obviously has a direct relation to the lives and safety of men working in coal mines. The restriction imposed is but temporary and incidental; it applies to but a very small part of the coal at a point along the land line, where it may well be left in place without interfering with the operation until both mines are almost exhausted, whereupon, as the Court doubtless knows, the adjoining owners enter into an agreement to remove the pillar.

The Rent Cases (*Block v. Hirsh*, 256 U. S. 135; *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170; *Levy Leasing Co. v. Siegel*, 258 U. S. 242) are not authority for the proposition that a property right of one may under the police power be transferred to another without compensation, even in time of emergency. Quite the contrary.

The principle involved in these cases was, it is submitted, not the police power but that of eminent domain. When the State regulates railroad rates, the fair return which the Constitution guarantees to the stockholders is really, when analysed, the just compensation required in condemnation proceedings. Instead of condemning a perpetual lease on the railroad with a fair rental for the stockholders and then operating the road at cost for the use of the entire public, the government allows the stockholders to operate it but requires them to serve the whole public without discrimination and permits them to net only the reasonable return to which their fair rental would have amounted. There is thus an essential difference in kind between a safety appliance act and a rate regulation. The one is an exercise of the police power, a prohibition of something injurious to the public, without the transfer of any property or property right of another either with or without compensation. The other is in its

essence an exercise of the power of eminent domain, involving not only the requirement that it be for the public benefit as distinguished from that of a privileged class, but also the requirement of just compensation. Such were the Rent Laws. The majority opinion disclaimed the introduction of any new principle of constitutional law; it merely held applicable a recognized rule to the admitted facts of the case. There has never been any doubt that a railroad company can be prohibited from charging more than reasonable rates, or that it can be precluded from putting one passenger off its trains to make room for another who is willing to pay a higher fare. There was no suggestion in the arguments or in the minority opinion that the means adopted were not necessary and appropriate to remedy the existing evil or that any other method was available to produce the same result which would be attended with less hardship to the landlords. Nor was there any attempt by the law to require the landlord to give the use of his property for nothing, nor any thought that the tenant should get something for nothing. All that the law did was, in view of the temporary suspension of the law of supply and demand, temporarily to suspend the landlord's arbitrary right of extortion, the power to exercise which was the direct and temporary result of the national crisis.

Even if it appeared that the owners of all the coal under buildings having no contractual right of support, intended presently to remove it, there would be no analogy to the conditions on which the validity of the Rent Laws was based, since there is no thought or suggestion that all the available dwellings, theatres, hotels and cemeteries are situated over such mines.

The Rent Laws were merely a temporary measure. They provided reasonable compensation to the landlord; they constituted virtually a condemnation by the sovereign of the term to November 1, 1922, and a transfer of

this term to the tenant at a reasonable cost, the just compensation provided by the Constitution.

The Kohler Act, however, is a permanent provision. It transfers for all time the Third Estate,—the right to the perpetual use of this coal—in the Mahon lot from the Coal Company to private individuals, and that without any compensation whatever.

In the court below, counsel, in discussing the Rent Cases, contended that the justification for the Kohler Act is even stronger than for the Rent Laws, inasmuch as the latter were merely to provide housing facilities, a necessity of life, whereas the Kohler Act is to "protect life itself." The obvious answer to this specious argument is, first, that the Kohler Act is on its face unnecessary to protect the lives of Mr. and Mrs. Mahon, and will be effective to that end only in case they neglect to take the precautions for their own protection which their restricted rights in their property demand that they shall take. Second, there is no rule of law which entitles a State, even to protect life itself, to transfer the property of one citizen without compensation to another.

Just here comes into force the distinction between the police power and the power of eminent domain, so clearly stated in a recent decision by the writer of the majority opinion in the case at bar—*Jackman v. Rosenbaum Co.*, 263 Pa. St. 158, 166.

An owner of dangerous drugs may, under the police power, be restricted from selling them without a license, or without a prescription, or may even be prohibited from selling them at all. This would constitute an exercise of the police power.

In time of epidemic it is conceivable that a State might temporarily prohibit the hoarding of essential medicines and might require physicians and druggists to sell them at reasonable rates. Even at such a time, the drug-

gist could not be required to dispense his medicines for nothing, or a baker his bread, and that though people were dying or starving for want of drugs and food.

If every word in the preamble of the Kohler Act were true there would still be no justification for the uncompensated transfer of the beneficial use of the supporting coal from defendant to plaintiff. No emergency will justify the transfer of property or a tangible property right from one citizen to another without just compensation.

The Kohler Act is not a police regulation. It is not a valid exercise of the right of eminent domain because, first, it is not exercised for the benefit of the public generally, and second, because it provides no compensation whatever to the party whose property is taken.

Mr. W. L. Pace, with whom *Mr. H. J. Mahon* was on the brief, for defendants in error.

Mr. George Ross Hull, with whom *Mr. George E. Alter*, Attorney General of the State of Pennsylvania, was on the brief, for the State of Pennsylvania, by special leave of court, as *amici curiae*.

The problem presented to the legislature involved the interests of the public in the life, health and safety of persons living in the mining communities, in the wholesale destruction of surface property, and in securing the maximum yield of coal from the mines; the interest of the surface owner in his property and of the surface dweller in his own safety; the interest of the mine owner in his labor supply and in securing the maximum yield of coal from his property. This problem after elaborate investigation, and abortive attempts, was sought to be met by the "Fowler Act," 1921, P. L. 1192, establishing the State Anthracite Mine Cave Commission and the "Kohler Act," *id.* 1198, here involved.

As was said by Mr. Chief Justice von Moschisker, in this case: "In determining whether the act is a reason-

able piece of legislation within the police power, we may 'call to our aid all those external or historical facts which are necessary for this purpose and which led to the enactment.' "

A reading of the Kohler Act involved in this appeal discloses that it is not directed to the reimbursement of surface owners for damage which may be caused either to persons or property, but is directed solely to the protection of human life. There are probably millions of dollars in surface improvements which are not reached and which were not intended to be reached by the provisions of this act. In view of the historical facts it is apparent that the good faith of this exercise of the police power is beyond question.

The legislative determination of the existence of a situation inimical to the public welfare which calls for an exercise of the police power, while it may be scrutinized by the courts, is not to be set aside unless it clearly appear that such determination was not well founded. *Lawton v. Steele*, 152 U. S. 133; *McLean v. Arkansas*, 211 U. S. 539; *Lower Vein Coal Co. v. Industrial Board*, 255 U. S. 144; *Nolan v. Jones*, 263 Pa. St. 124; *Levy Leasing Co. v. Siegel*, 258 U. S. 242.

The protection of the life, health and safety of the public in the anthracite mining communities is the primary purpose of the act. Its interference with property rights is merely incidental. *Commonwealth v. Alger*, 7 Cush. 84; *Holden v. Hardy*, 169 U. S. 392.

Land which is underlaid with coal is a kind of property which, by reason of operations conducted upon it or by reason of contracts made with respect to it, may become a grave menace to the life, health and safety of the public.

The dangers incident to operations conducted on coal lands have been met by extensive and elaborate codes of laws regulating coal mining. The constitutionality of these laws has long since been settled. The danger to

the public arising from the contracts entered into with respect to coal lands, however, was not clearly recognized until recent years.

As the law relating to coal lands developed prior to the enactment of the Kohler Act, it permitted the creation, by appropriate conveyances, of three distinct property rights or estates in lands: (1) the surface, (2) the coal, and (3) the right of support; and these estates might be vested in different persons at the same time. *Graff Furnace Co. v. Scranton Coal Co.*, 244 Pa. St. 592; *Penman v. Jones*, 256 Pa. St. 416; *Charnetski v. Coal Mining Co.*, 270 Pa. St. 459. Owners in fee of coal lands might part with their right to the surface, reserving to themselves the right to mine all of the coal without any obligation to support the surface and without liability for any damage resulting from its subsidence.

It is probable that when conveyances of surface rights were first made, the right to remove coal without liability to the surface owners was reserved merely as a safeguard against an occasional injury which might occur through first mining; and that second mining, or the removal of pillars, was not then in contemplation. The large extent of territory underlaid with anthracite coal, the large number of people living upon its surface, and the very obvious menace to the life, health and safety of these people, clothed these lands and these mining operations with a public interest which manifestly made them a proper subject for the exercise of the police power. If the public welfare be threatened by the existence or the certain occurrence of a grave public danger the legality of an exercise of the police power to prevent or to remedy cannot be questioned.

The exercise of the police power to regulate contracts relating to land has been sustained where the disaster threatened was of less serious consequence than that which is dealt with in the act now under consideration.

Block v. Hirsh, 256 U. S. 135; *Levy Leasing Co. v. Siegel*, 258 U. S. 242.

It will be urged, however, that these cases are not applicable to the case now under consideration, for the reason that in them the acts involved were emergency laws passed to meet an urgent temporary necessity and expressly limited by their terms to a brief period. Ordinarily the operation of economic laws regulates the supply of houses so that dwellings for rent are not clothed with such a public interest as would subject the contracts of landlord and tenant to the regulatory exercise of the police power. The nature of the property, the rights in it and the contracts relating to it, are such that regulation of the character contained in those acts could be justified only by the existence of extraordinary circumstances which the legislature and the courts knew must disappear when the emergency passed. But we do not understand the Court to mean that if a situation which threatened the public safety and welfare might be dealt with in an emergency, it could not be controlled by appropriate regulation if that emergency continued. The sound reason which sustained the validity of those acts during the period when the emergency was reasonably expected to continue will sustain as a permanent change an act which is intended to meet a permanent menace to the public. Accordingly the same fundamental principles of law which sustained the rent laws during the period of emergency, will sustain the Kohler Act.

It should be noted also in considering the application of the rent cases, that the case at bar falls within a class of cases which the dissenting opinion recognized as proper for the exercise of the police power. *Block v. Hirsh*, 256 U. S. 135, 167.

The Kohler Act is in line with numerous familiar cases wherein legislation involving the exercise of the police power has been sustained. The well established restric-

tion placed upon the right of public service companies to fix rates by contract, the power to forbid absolutely the sale of oleomargarine for the purpose of preventing possible frauds, the power to prevent the sale of unwholesome meats and other foods, the power to regulate or prohibit the manufacture of corn and rye into whiskey, the power to forbid mining to the boundary of a mine property without leaving a barrier pillar of sufficient thickness to prevent possible injury from the flooding of an adjoining mine, are familiar illustrations of the exercise of the police power enacted to avoid dangers which are neither so grave nor so certain as those which the Kohler Act seeks to prevent.

In its application to all coal lands where the right of surface support is still vested in the surface owner, the effect of the Kohler Act is to prevent the making of any valid contract whereby the right of support may be separated from the surface ownership in such manner as to permit the subsidence of any of the structures or facilities mentioned in the act. It must be remembered that there is a broad field in which the Kohler Act does thus operate. If the circumstances which now exist in the anthracite regions could have been foreseen and certainly predicted by the legislature a half century ago, it would clearly have been within its power to limit the owner's right to contract, by the enactment of such a regulatory measure as the Kohler Act. And we are confident that if it were not for the existence of contracts already entered into, the constitutionality of this act would not have been questioned.

It is an act, prospective in its operation, regulating the future conduct of mining for anthracite coal. It operates generally upon all mines, including those now being operated and all which may be opened and operated in the future. It operates without regard to any private contracts which may have been made relating to surface sup-

port. It operates alike upon lands where the surface owner still has the right of support, and upon those where the right of support has been separated from ownership of the surface and is held by the owner of the coal or by a third person.

But if the act in its operation upon lands where the right of support and the ownership of the surface have not been separated, be a constitutional exercise of the police power, it is equally valid in its operation upon lands where these interests are held by different persons.

Persons cannot remove their property from the reach of the police power by entering into contracts with respect to it. *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170.

All property within the State is held, and all contracts are entered into subject to the future exercise of the police power of the State. Every such agreement was entered into by the parties with full knowledge that whenever the existence of such contracts and the exercise of the license reserved should threaten the life, health or safety of the people, the Commonwealth in its sovereign power might interpose and restrict the use of those contract rights to such extent as might be necessary in the public interest. Owners of coal lands, who saw highways being laid out and improved, railroads and trolley lines built, sewers and gas mains laid, light, telephone and power wires stretched overhead, depots, stores, theatres, hotels and dwellings constructed, and who, perhaps as many of the coal companies did, laid out the surface in building lots dedicating streets and alleys to public use, selling the lots for the purpose of having dwellings erected thereon,—such owners were bound to know that whenever the time should come when the exercise of the license which they had reserved would threaten the welfare of the communities upon the surface, the police power of the State might be interposed to restrict their rights. *Scranton v. Public*

Service Commission, 268 Pa. St. 192; *Relief Electric Light, Heat & Power Company's Petition*, 69 Pa. Super Ct. 1, 8.

In *Russell v. Sebastian*, 233 U. S. 195, and *New Orleans Gas Light Co. v. Louisiana Light Co.*, 115 U. S. 650, no exercise of the police power was involved; in the latter, this Court recognised the principle which we have stated.

The Kohler Act does not take the property of the plaintiff in error. *Commonwealth v. Plymouth Coal Co.*, 232 Pa. St. 141; *s. c.* 232 U. S. 531. The act does not go as far as the Barrier Pillar Act. It contains no provision requiring any mine owner to leave coal in place. If natural support other than coal in the pillars be available, or if artificial support be provided, every pound of coal may be removed from the mines.

Nor does it transfer the right of support from the owner of the coal to the surface owner. This right, license or estate in the land is nothing more than an immunity from civil liability for damages to the surface owner. Under the Kohler Act, this immunity continues.

If the act were designed, as the plaintiff in error contends, for the protection of the property rights of the surface owners, and not as a *bona fide* and reasonable exercise of the police power, it would contain two features which are conspicuously absent from it: First, it would provide that the liability of the defendant for damages to the person or property of the plaintiffs which was released by the contract contained in the deed, should be restored; second, it would apply generally to all valuable structures upon the surface.

Notice to the surface owner to vacate his property is not sufficient to prevent injury to him or to the public. This same objection might have been made to the reasonableness of all of the legislation which has been enacted for the protection of persons employed in mines. Communities must exist in or near the vicinity of the mines or they cannot be operated, and it is a matter of concern to

the public that persons be permitted to dwell there in safety. Even if it were possible to remove whole cities from their present locations, and reconstruct them upon sites beyond the coal measures, those sites may be so distant from the mines and so separated by the topography of the country that access to and from the collieries would be impracticable and the mines would close for want of labor. Moreover, cities are built where nature affords an opportunity for them. Industrial communities cannot be perched upon the mountains nor in places inaccessible to roads and railroads. Nor is it always practicable or possible for the individual dweller upon the surface to find another house in which to live. Throughout the State of Pennsylvania and elsewhere in this and foreign countries there is an acute shortage of houses due to conditions prevailing during the war, and there is no doubt that this condition, which has elsewhere proven so serious as to give rise to the legislation reviewed in the Rent Cases (already cited), has been aggravated in the coal mining communities by reason of the very conditions which gave rise to the Kohler Act. Or it may be that the occupants of the dwelling will recklessly disregard the notice given and take the chance of escaping injury. The notice will not avail to prevent the disastrous results of his necessity or folly. See *Commonwealth v. Plymouth Coal Co.*, 232 Pa. St. 141, 146.

The only practicable way in which the life, health and safety of the public in these communities may be adequately safeguarded is by the enforcement of such restrictions as are contained in the Kohler Act, and for this reason those restrictions are reasonable even though they limit to some extent the rights of others.

Mr. Philip V. Mattes, by leave of court, filed a brief on behalf of the City of Scranton, as *amicus curiae*.

Mr. Philip V. Mattes, *Mr. Frank M. Walsh* and *Mr. Owen J. Roberts*, by leave of court, filed a brief on behalf

of the Scranton Surface Protective Association, as *amici curiae*.

Mr. C. La Rue Munson and Mr. Edgar Munson, by leave of court, filed a brief on behalf of the Scranton Gas & Water Company, as *amici curiae*.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a bill in equity brought by the defendants in error to prevent the Pennsylvania Coal Company from mining under their property in such way as to remove the supports and cause a subsidence of the surface and of their house. The bill sets out a deed executed by the Coal Company in 1878, under which the plaintiffs claim. The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal. But the plaintiffs say that whatever may have been the Coal Company's rights, they were taken away by an Act of Pennsylvania, approved May 27, 1921, P. L. 1198, commonly known there as the Kohler Act. The Court of Common Pleas found that if not restrained the defendant would cause the damage to prevent which the bill was brought, but denied an injunction, holding that the statute if applied to this case would be unconstitutional. On appeal the Supreme Court of the State agreed that the defendant had contract and property rights protected by the Constitution of the United States, but held that the statute was a legitimate exercise of the police power and directed a decree for the plaintiffs. A writ of error was granted bringing the case to this Court.

The statute forbids the mining of anthracite coal in such way as to cause the subsidence of, among other

things, any structure used as a human habitation, with certain exceptions, including among them land where the surface is owned by the owner of the underlying coal and is distant more than one hundred and fifty feet from any improved property belonging to any other person. As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the police power can be stretched so far.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power.

This is the case of a single private house. No doubt there is a public interest even in this, as there is in every purchase and sale and in all that happens within the commonwealth. Some existing rights may be modified even in such a case. *Rideout v. Knox*, 148 Mass. 368. But usually in ordinary private affairs the public interest does not warrant much of this kind of interference. A source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public. *Wesson v. Washburn Iron Co.*, 13 Allen, 95, 103. The extent of

the public interest is shown by the statute to be limited, since the statute ordinarily does not apply to land when the surface is owned by the owner of the coal. Furthermore, it is not justified as a protection of personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house. On the other hand the extent of the taking is great. It purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs. If we were called upon to deal with the plaintiffs' position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The Attorney General of the State, the City of Scranton, and the representatives of other extensive interests were allowed to take part in the argument below and have submitted their contentions here. It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved. As said in a Pennsylvania case, "For practical purposes, the right to coal consists in the right to mine it." *Commonwealth v. Clearview Coal Co.*, 256 Pa. St. 328, 331. What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This

we think that we are warranted in assuming that the statute does.

It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine, in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much. The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule,

BRANDEIS, J., dissenting.

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whether they do not stand as much upon tradition as upon principle. *Bowditch v. Boston*, 101 U. S. 16. In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. *Spade v. Lynn & Boston R. R. Co.*, 172 Mass. 488, 489. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we already have said, this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court. The late decisions upon laws dealing with the congestion of Washington and New York, caused by the war, dealt with laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. They went to the verge of the law but fell far short of the present act. *Block v. Hirsh*, 256 U. S. 135. *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170. *Levy Leasing Co. v. Siegel*, 258 U. S. 242.

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

Decree reversed.

MR. JUSTICE BRANDEIS, dissenting.

The Kohler Act prohibits, under certain conditions, the mining of anthracite coal within the limits of a city in such a manner or to such an extent "as to cause the . . .

subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed." Coal in place is land; and the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying compensation; and the power to prohibit extends alike to the manner, the character and the purpose of the use. Are we justified in declaring that the Legislature of Pennsylvania has, in restricting the right to mine anthracite, exercised this power so arbitrarily as to violate the Fourteenth Amendment?

Every restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgment by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious,—as it may because of further change in local or social conditions,—the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.

The restriction upon the use of this property can not, of course, be lawfully imposed, unless its purpose is to protect the public. But the purpose of a restriction does not cease to be public, because incidentally some private

persons may thereby receive gratuitously valuable special benefits. Thus, owners of low buildings may obtain, through statutory restrictions upon the height of neighboring structures, benefits equivalent to an easement of light and air. *Welch v. Swasey*, 214 U. S. 91. Compare *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61; *Walls v. Midland Carbon Co.*, 254 U. S. 300. Furthermore, a restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an appropriate means to the public end. But to keep coal in place is surely an appropriate means of preventing subsidence of the surface; and ordinarily it is the only available means. Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put. The liquor and the oleomargarine cases settled that. *Mugler v. Kansas*, 123 U. S. 623, 668, 669; *Powell v. Pennsylvania*, 127 U. S. 678, 682. See also *Hadacheck v. Los Angeles*, 239 U. S. 394; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498. Nor is a restriction imposed through exercise of the police power inappropriate as a means, merely because the same end might be effected through exercise of the power of eminent domain, or otherwise at public expense. Every restriction upon the height of buildings might be secured through acquiring by eminent domain the right of each owner to build above the limiting height; but it is settled that the State need not resort to that power. Compare *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358; *Missouri Pacific Ry. Co. v. Omaha*, 235 U. S. 121. If by mining anthracite coal the owner would necessarily unloose poisonous gasses, I suppose no one would doubt the power of the State to prevent the mining, without buying his coal fields. And why may not the State, likewise, without paying compensation, prohibit one from digging so deep or excavating so near the surface, as to expose the community to

like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.

It is said that one fact for consideration in determining whether the limits of the police power have been exceeded is the extent of the resulting diminution in value; and that here the restriction destroys existing rights of property and contract. But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property. The rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. The sum of the rights in the parts can not be greater than the rights in the whole. The estate of an owner in land is grandiloquently described as extending *ab orco usque ad coelum*. But I suppose no one would contend that by selling his interest above one hundred feet from the surface he could prevent the State from limiting, by the police power, the height of structures in a city. And why should a sale of underground rights bar the State's power? For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute. Ordinarily a police regulation, general in operation, will not be held void as to a particular property, although proof is offered that owing to conditions peculiar to it the restriction could not reasonably be applied. See *Powell v. Pennsylvania*, 127 U. S. 678, 681, 684; *Murphy v. California*, 225 U. S. 623, 629. But even if the particular facts are to govern, the statute should, in my opinion, be upheld in this case. For the defendant has failed to adduce any evidence from which

it appears that to restrict its mining operations was an unreasonable exercise of the police power. Compare *Reinman v. Little Rock*, 237 U. S. 171, 177, 180; *Pierce Oil Corporation v. City of Hope*, 248 U. S. 498, 500. Where the surface and the coal belong to the same person, self-interest would ordinarily prevent mining to such an extent as to cause a subsidence. It was, doubtless, for this reason that the legislature, estimating the degrees of danger, deemed statutory restriction unnecessary for the public safety under such conditions.

It is said that this is a case of a single dwelling house; that the restriction upon mining abolishes a valuable estate hitherto secured by a contract with the plaintiffs; and that the restriction upon mining cannot be justified as a protection of personal safety, since that could be provided for by notice. The propriety of deferring a good deal to tribunals on the spot has been repeatedly recognized. *Welch v. Swasey*, 214 U. S. 91, 106; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365; *Patson v. Pennsylvania*, 232 U. S. 138, 144. May we say that notice would afford adequate protection of the public safety where the legislature and the highest court of the State, with greater knowledge of local conditions, have declared, in effect, that it would not? If public safety is imperiled, surely neither grant, nor contract, can prevail against the exercise of the police power. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Atlantic Coast Line R. R. Co. v. Goldsboro*, 232 U. S. 548; *Union Dry Goods Co. v. Georgia Public Service Corporation*, 248 U. S. 372; *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269. The rule that the State's power to take appropriate measures to guard the safety of all who may be within its jurisdiction may not be bargained away was applied to compel carriers to establish grade crossings at their own expense, despite contracts to the contrary; *Chicago, Burlington & Quincy R. R. Co. v. Nebraska*, 170 U. S. 57;

and, likewise, to supersede, by an employers' liability act, the provision of a charter exempting a railroad from liability for death of employees, since the civil liability was deemed a matter of public concern, and not a mere private right. *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S. 408. Compare *Boyd v. Alabama*, 94 U. S. 645; *Stone v. Mississippi*, 101 U. S. 814; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746; *Douglas v. Kentucky*, 168 U. S. 488; *Pennsylvania Hospital v. Philadelphia*, 245 U. S. 20, 23. Nor can existing contracts between private individuals preclude exercise of the police power. "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 357; *Knoxville Water Co. v. Knoxville*, 189 U. S. 434, 438; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342. The fact that this suit is brought by a private person is, of course, immaterial to protect the community through invoking the aid, as litigant, of interested private citizens is not a novelty in our law. That it may be done in Pennsylvania was decided by its Supreme Court in this case. And it is for a State to say how its public policy shall be enforced.

This case involves only mining which causes subsidence of a dwelling house. But the Kohler Act contains provisions in addition to that quoted above; and as to these, also, an opinion is expressed. These provisions deal with mining under cities to such an extent as to cause subsidence of—

(a) Any public building or any structure customarily used by the public as a place of resort, assemblage, or amusement, including, but not being limited to, churches, schools, hospitals, theatres, hotels, and railroad stations.

(b) Any street, road, bridge, or other public passage-way, dedicated to public use or habitually used by the public.

(c) Any track, roadbed, right of way, pipe, conduit, wire, or other facility, used in the service of the public by any municipal corporation or public service company as defined by the Public Service Company Law.

A prohibition of mining which causes subsidence of such structures and facilities is obviously enacted for a public purpose; and it seems, likewise, clear that mere notice of intention to mine would not in this connection secure the public safety. Yet it is said that these provisions of the act cannot be sustained as an exercise of the police power where the right to mine such coal has been reserved. The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be "an average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, *Wurts v. Hoagland*, 114 U. S. 606; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; or upon adjoining owners, as by party wall provisions, *Jackman v. Rosenbaum Co.*, ante, 22. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage. There was no reciprocal advantage to the owner prohibited from using his oil tanks in 248 U. S. 498; his brickyard, in 239 U. S. 394; his livery stable, in 237 U. S. 171; his billiard hall, in 225 U. S. 623; his oleomargarine factory, in 127 U. S. 678; his brewery, in 123 U. S. 623; unless it be the advantage of living and doing business in a civilized community. That reciprocal advantage is given by the act to the coal operators.